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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERTS ORLIKOWSKI, and SCOTT WAY,

Petitioners,

v

CASSENS TRANSPORT CO. and CRAWFORD & COMPANY, foreign corporations, and DR. SAUL MARGULES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

MUST A CIVIL RICO COMPLAINT ALLEGING MAIL FRAUD ALSO ALLEGE COMMON LAW FRAUD?

PARTIES TO THE PROCEEDING

Petitioners (defendants and appellees below):

PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI, and SCOTT WAY

Respondents (plaintiffs and appellants below):

CASSENS TRANSPORT COMPANY and CRAWFORD & COMPANY, foreign corporations, and DR. SAUL MARGULES,

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18 U.S.C. §§1341, 1343
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28 U.S.C. §2101

Michigan Compiled Laws sections:
418.301
418.315
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418. 801

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CITATIONS OF THE LOWER COURTS' OPINIONS AND ORDERS

PAUL BROWN, ET AL, Plaintiffs-appellants v CASSENS TRANSPORT COMPANY, ET AL, Defendants-appellees, United States Court of Appeals for the Sixth Circuit, case no. 05-1843,

AMENDED ORDER filed December 20, 2007
(Denying petition for rehearing en banc)

PAUL BROWN, ET AL, Plaintiffs-appellants v CASSENS TRANSPORT COMPANY, ET AL, Defendants-appellees, United States Court of Appeals for the Sixth Circuit, case no. 05-1843,

ORDER filed December 17, 2007
(Denying petition for rehearing en banc)

PAUL BROWN, ET AL, Plaintiffs-appellants v CASSENS TRANSPORT COMPANY, ET AL, Defendants-appellees, United States Court of Appeals for the Sixth Circuit, case no. 05-1843,

OPINION and JUDGMENT filed July 10, 2007

PAUL BROWN, ET AL, Plaintiffs-appellants v CASSENS TRANSPORT COMPANY, ET AL, Defendants-appellees, United States District Court for the Eastern District of Michigan, case no. 04-72316

ORDER DENYING PLAINTIFFS' MOTION TO AMEND COMPLAINT
July 22, 2005

PAUL BROWN, ET AL, Plaintiffs-appellants v CASSENS TRANSPORT COMPANY, ET AL, Defendants-appellees, United States District Court for the Eastern District of Michigan, case no. 04-72316

MEMORANDUM OPINION AND ORDER
July 15, 2005
JUDGMENT IN FAVOR OF DEFENDANTS
July 18, 2005

BASIS FOR JURISDICTION

1. The amended order of the Court of Appeals denying plaintiff's motion for rehearing en banc was entered December 20, 2007.

2. Jurisdiction to review this writ exists under 28 U.S.C. §2101.

THE STATUTES INVOLVED IN THE CASE

Federal

A. The Racketeer Influenced Corrupt Organization Act (RICO) §18 U.S.C. 1961 and §18 U.S.C. 1962(c).

B. 18 U.S.C. §1341 (mail fraud), 18 U.S.C. §1343 (wire fraud)

State

Michigan Workers Disability Compensation Act, MCL 418.101 et seq, sections 301, 315, 631, 801

STATEMENT OF THE CASE

This case presents a major question arising under the Racketeer Influence and Corrupt Organizations Act, 18 U.S.C. §1961 et seq (RICO): whether plaintiffs in a civil RICO suit who claim they are victims of mail fraud must also allege common law fraud, even though the government in a criminal RICO case alleging mail fraud need not. The Sixth Circuit injected a pleading requirement - common law fraud - not found in the RICO statute and not found in the mail fraud statute.

RICO §1961(1)(B) provides that "racketeering activity" includes "any act which is indictable" under the mail fraud statute. The Court of Appeals for the Sixth Circuit held in 1984, in *Bender v Southland Corp,* 749 F2d 1205, that a plaintiff in a RICO civil suit claiming mail fraud as a racketeering activity must allege a misrepresentation was made to him by mail upon which he relied, even though the government need not allege misrepresentation and reliance (common law fraud) in a RICO prosecution based on mail fraud. Both the civil and the criminal cases are based on the same RICO and maiil fraud statutes, *but the Sixth Circuit in Bender added a pleading requirement not found in either statute.*

In the present case, the District Court granted defendants' motion to dismiss brought under Fed. R. Civ. Proc. 12(b)(6), citing *Bender* - but the three judge panel indicated plaintiffs' position was legitimate and urged this Court to overrule *Bender*. The panel said it was required to follow Sixth Circuit precedent, absent reversal by the Sixth Circuit sitting en banc. Plaintiffs' motion for rehearing en banc was denied.

Six other Circuits disagree with *Bender*, all holding that reliance by the target of the scheme is not required in a civil RICO complaint, because RICO does not require the government in a criminal case based on mail fraud to prove reliance by the target. Some of the Circuits have ruled - as plaintiff urges here - that RICO requires only that mail fraud targets allege in their civil suit that they are the direct victims of a scheme to defraud "which is indictable" under 18 U.S.C. §1341 (prohibiting mail fraud). Still other Circuits have held that a RICO mail fraud civil claim is stated when plaintiffs allege they are the direct victims of a misrepresentation made to and relied on by a third person, as part of a scheme to defraud indictable under 18 U.S.C. §1341. If either of these rules rule is adopted by the Court - if the RICO statute is interpreted literally for civil cases, as it is for criminal cases - the decision of the Sixth Circuit in this case must be reversed.

Bender is also incompatible with *Neder v United States*, 527 US 1, 119 S Ct 1827, 144 L Ed 2d 35 (1999), which held that reliance is not required for an act to be indictable under the mail fraud statute.[1]

Recently, this Court decided *Anza et al v Ideal Steel Supply Corp*, 547 US ___ (04-433, June 5, 2006).

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[1] Petitioners' arguments throughout this brief are intended to apply to both the mail and wire fraud statutes, 18 U.S.C. §§1341 and 1343, but for brevity petitioners use only the term "mail fraud."

Defendant in that case requested this Court to hold "that a plaintiff may not assert a RICO claim predicated on mail fraud or wire fraud unless it demonstrates it relied on the defendant's misrepresentations." The Court said that because the plaintiff "has not satisfied the proximate-cause requirement articulated in *Holmes* [*v Security Investors Protection Corp*, 503 US 258, 112 S Ct 1311, 117 L Ed 2d 532 (1992)], we have no occasion to address the substantial question whether a showing of reliance is required." *Anza*, id, slip opinion 9.

This "substantial question" is squarely presented in this case.

Justice Thomas did address this question in his dissent in *Anza* and rejected the reliance requirement:

> "I disagree with the conclusion that reliance is required at all. In my view, the mere fact that the predicate acts underlying a particular RICO violation happen to be fraud offenses does not mean the reliance, an element of common-law fraud, is also incorporated as an element of a civil RICO claim." Id, slip opinion, 14.

This petition should be granted because "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court" (SC Rule 10(c)), and because "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" (SC Rule 10(a)).

Synopsis of This Case

Plaintiffs brought suit in the United States District Court for the Eastern District of Michigan, alleging a civil RICO cause of action authorized by 18 U.S.C. §1964(c). Plaintiffs claimed defendants violated 18 U.S.C. §1962(c) of RICO, which provides in pertinent part:

> It shall be unlawful for any person employed by or associated with any enterprise... to conduct or participate... directly in the conduct of such enterprise's affairs through a pattern of racketeering activity...

18 U.S.C. §1961 of RICO states:-

> As used in this chapter -
>
> (1) "racketeering activity" means..... (B) *any act which is indictable* under any of the following provisions of title 18, United States Code: .... section 1341 (relating to mail fraud), section 1343 (relating to wire fraud).....[emphasis added]

Plaintiffs are employees of Cassens Transport Company who claim they were injured on the job, entitling them to workers compensation benefits under Michigan's Workers Disability Compensation Act ("WDCA"), Michigan Compiled Laws 418.101 et. seq., from Cassens and from Cassen's claims adjuster, Crawford & Company. The benefits consisted of weekly wage loss checks and payment of medical care for their injuries.

Plaintiffs filed suit in the District Court, alleging that defendants schemed to fraudulently deprive them of their benefits. Plaintiffs alleged that defendants' scheme used the mails in two ways:

> (1) Crawford, acting in concert with Cassens, mailed fraudulent Notices of Dispute to them and to the Michigan Workers Compensation Agency, which administers the WDCA; the Notice of Dispute is a form which an insurer is required to file with the Agency when it terminates or denies benefits. The Notices of Dispute gave false explanations for the denial or termination of benefits to the plaintiffs.
>
> (2) Crawford, acting in concert with Cassens, obtained and mailed false medical reports from defendant Dr. Margules. Crawford cited these false medical reports in Notices of Dispute as the basis for terminating or denying benefits.

Each of these acts involved mail fraud in violation of 18 U.S.C. §1341. Plaintiffs alleged defendants' fraudulent acts directly and immediately injured them because upon the mailing of the Notices of Dispute Crawford cut off or denied their workers compensation benefits, and caused them attorney expense to recover those benefits.

Plaintiffs alleged defendants targeted them in their scheme, proximately injured them, and used the mails and wires in furtherance of the fraudulent scheme. However, the original complaint did not allege that plaintiffs or anyone else relied on misrepresentations sent by mail or wire.

Defendants filed a motion to dismiss the original complaint under Rule. 12(b)(6), asserting, inter alia, that plaintiffs failed to plead common law fraud, citing *Bender,* supra.

Before the District Court ruled on the motion to dismiss, plaintiffs moved for leave to file an amended complaint which alleged that defendants, as part of their scheme, made misrepresentations to third parties (the Workers Compensation Agency and its magistrates) upon which the third parties relied, proximately injuring plaintiffs. (Apx 61)

The District Court, relying on *Bender*, granted the motion to dismiss the original complaint. (Apx 27)

After the District Court granted defendants' motion to dismiss, it denied plaintiffs' motion for leave to file the amended complaint. (Apx 26)

The Court of Appeals affirmed the dismissal of the original complaint, citing *Bender.* (Apx 5) It also held that plaintiff failed to appeal the denial of the motion for leave to file the amended complaint.

The panel indicated they would overturn *Bender* and would not require reliance by anyone as long as plaintiffs properly alleged they were proximately injured by defendants' fraudulent scheme, but "absent a clear directive from the Supreme Court or a decision of this court sitting en banc, we are not at liberty to reverse this court's precedent."

Judge Gibbons, writing for the 2-1 majority, noted that in *Systems Management v Loiselle*, 303 F.3d 100 (1st Cir. 2002)

> ...the First Circuit has taken a different approach to civil RICO liability, concluding that RICO's terms "does not require 'reliance' by anyone," id at 104, and holding that "under a literal reading of RICO - the presumptive choice in interpretation - nothing more than the criminal violation and resulting harm is required," id. While we believe the First Circuit's position is legitimate, as a subsequent panel applying the law of this circuit we are not empowered to disregard our own precedent in favor of the views of other circuits.

Judge Ackerman concurred in the 2-1 decision only because *Bender* was binding precedent absent reversal in an en banc review. "I hope that the Sixth Circuit elects, at some point in the future, to consider this issue en banc and reaches what I suggest is the proper conclusion that reliance need not be shown in a civil RICO case based on mail or wire fraud."

Judge Moore in dissent stated,

> Bender was inconsistent with our precedent interpreting the mail and wire fraud statutes when it was decided, and this inconsistency remains today.... To prevent the error begun in *Bender* and extended today from snowballing any further, we should convene the court en banc to reexamine whether a civil RICO claim incorporates the element of reliance. Notably, in a case in which the

> Supreme Court declined to decide whether a showing of reliance is required, *Anza v Ideal Steel Supply Corp*, ___ US ___, 126 S. Ct. 1991, 1998 (2006), the only Justice to address the issue (Justice Thomas) wrote separately to express his conclusion that reliance is not an elemnt of a civil-RICO claim. Id at 2007-2008."

Plaintiffs' motion for rehearing en banc was denied. (Appx 3)

Basis for Federal Jurisdiction in the District Court

Federal question jurisdiction is conferred on plaintiffs' claims by the Federal Racketeer Influence and Corrupt Organizations Act, 18 U.S.C. §1961 et seq (RICO). Diversity of citizenship jurisdiction is conferred by 28 U.S.C. §1332 (plaintiffs are citizens of Michigan, defendants are citizens of other states, and the amounts in controversy exceed $75,000).

ARGUMENT

1. Background and Procedural History

Paul Brown and his co-workers are truck drivers who were injured while working for Cassens Transport Company. They sought Michigan workers compensation benefits from defendants. Crawford & Company adjusted workers compensation claims for Cassens. Defendants denied benefits.

Michigan's workers compensation scheme was established by the Worker's Disability Compensation Act ("WDCA"), Michigan Compiled Laws ["MCL"] §418.101 et. seq.. Section 301(1) of the WDCA provides that an "employee who receives a personal injury arising out of the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act." (MCL 418.301(1), Apx 75) Section 315 provides that the employer shall pay the medical expenses of the injury. (MCL 418.315, Apx 75)

Section 801 of the WDCA provides for sanctions against an employer and its insurer if benefits are not paid promptly to the injured employee. However, an insurer may avoid sanctions by filing a Notice of Dispute with the Workers Compensation Agency (the "Agency"). MCL 801.

A claims adjuster seeking to deny or terminate an employee's benefits must file a Notice of Dispute with the Agency (formerly the Bureau of Workers Disability Compensation) and send a copy to the employee. The manner and method of disputing a claim via a Notice of Dispute is set out in Administrative Rule R408.33:

> (1) On or before the fourteenth day after the employer has notice or knowledge of an alleged injury or death, a carrier... shall notify the bureau, on form 107, if the right of the injured employee or dependant to compensation is disputed.... A copy of form 107, notice of dispute, shall be mailed or given to the injured employee.

A Notice of Dispute form is in the Appendix at 68.

Paul Brown and his co-workers brought suit pursuant to §1964(c) of the federal Racketeer Influence and Corrupt Organization Act ("RICO"), 18 U.S.C. §1961, et. seq.. RICO Section 1964(c) provides in part:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee... (Apx 74)

Plaintiffs alleged defendants fraudulently deprived them of their workers compensation benefits through a "pattern of racketeering activity" in violation of §1962(c), which provides:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign

> commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. (Apx 73)

Plaintiffs alleged defendants committed a series of "predicate acts" of "racketeering activity" involving mail and wire fraud in violation of 18 U.S.C. §1961(1) of the RICO statute. §1961(1) defines racketeering activity to include "any act which is indictable" under the mail and wire fraud provisions of title 18 of the United States Code, §§1341 and 1343. (The text of §§1341 and 1343 are in the appendix at 69.)

Mr. Brown and his co-plaintiffs claimed Cassens and Crawford applied this scheme to all of them, as a group. Plaintiffs alleged defendants sometimes employed defendant Dr. Margules to write false medical reports to effect their scheme:

> ALLEGATIONS COMMON TO ALL CAUSES OF ACTION
>
> ***
>
> 5. Decisions regarding paying claims or terminating payment were made jointly by defendants, or were made by Crawford & Company after consulting with Cassens, or were ratified by Cassens after being made by Crawford. These allegations are made on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery. The persons with decision power at Cassens

and Crawford formed an "enterprise" for purposes of the Racketeer Influenced and Corrupt Organizations Act (RICO).

6. A. One or more of these persons committed mail fraud, wire fraud and or conspiracy to defraud, in a repeated and continuing pattern, by fraudulently denying benefits. This fraud was accomplished in part by use of the United States mails and by electronic communications in violation of 18 USC 1341 and 1343.... These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

B. This fraud was also accomplished in part by Cassens and Crawford deliberately selecting doctors such as Dr. Saul Margules to get a medical opinion which defendants could use to deny benefits to plaintiff, rather than to get an objective opinion from a qualified specialist to help defendants decide whether plaintiff s were entitled to benefits. Crawford, Cassens and their attorneys knew Dr. Margules was a family doctor who was not trained or certified in orthopedic medicine, although most of the injuries suffered by Cassens employees were within the field of orthopedic medicine, as they involved bones, joints and muscles. Crawford, Cassens and their attorneys knew Margules and other doctors they employed to examine plaintiffs and other drivers were "cut off" doctors, that is, doctors upon whom Crawford and Cassens could rely for opinions

> which they could cite as grounds for cutting off or denying benefits, either by stating plaintiffs were able to work, or, if disabled, their injury was not work related. Doctor Margules and these other doctors had over many years received substantial income from defendants and their attorneys. .... Defendants used electronic and mail communications in furtherance of defendants' scheme of fraud, in violation of 18 USC 1341, 1343 and 1512. This fraud was also accomplished by defendants deliberately ignoring communications from objective doctors, trained in orthopedic medicine and other specialities, indicating plaintiffs did have work-related disabilities. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

In addition to the common allegations based on false medical reports created by Dr. Margules in conspiracy with Cassens and Crawford, plaintiffs made individual allegations. Gary Thomas claimed he submitted to defendants for payment a medical bill arising out of a work-related injury, along with an Attending Physician's Statement declaring that the bill was for the work-related injury; despite having the Physician's Statement, Crawford & Company denied payment on the false ground it had "no medical establishing causation." William Fanaly, a long-haul truck driver like his co-plaintiffs, was injured walking to his truck; he alleged defendants denied his claim on the ground the manner of injury was not work related, even though defendants knew an injury which occurs when a driver walks to his truck was compensable under Michigan law that had been clear for one hundred years. Paul Brown alleged that defendants refused to pay his work-injury-related medical bills even after a magistrate ordered defendants to pay the medical expenses for his work injury; defendants falsely claimed they were not obligated to pay the bills when in fact they were expressly required by Michigan statute to do so. (Complaint paras 41 and 41A) Gary Riggs alleged Crawford terminated his benefits on the false ground it lacked medical information, when it actually had the information. (Complaints para 48)

Each of the plaintiffs claimed defendants mailed to them and to the Michigan Workers Compensation Agency fraudulent Notices of Dispute. The Notice of Dispute is a form which workers compensation claim adjusters are required to mail to the Agency and to the worker when the adjuster denies or terminates a claim; the form states the adjuster is required to state the grounds for termination or dispute, and warns of the penalty of perjury for filing a false Notice of Dispute (see Appx 68).

Defendants filed motions to dismiss the complaint under civil procedure Rule 12(b)(6), failure to state a claim upon which relief can be granted. The district court on July 15, 2005, issued an opinion and order granting the motion, holding, inter alia, that a civil RICO plaintiff must allege common law fraud.

Before the district court issued its order and opinion but after oral argument on defendants' motion to dismiss, plaintiffs filed a motion under Rule 18 for leave to file a first amended complaint.

The proposed amendments alleged basically that defendants mailed forms, called Notices of Dispute, which the Michigan Workers Compensation Agency requires an employer and its insurer to file with the Agency when they deny a workers compensation claim. Plaintiffs alleged these Notices of Dispute contained misrepresentations on which the Agency and or its Magistrate relied, proximately causing injury to plaintiff. Plaintiff's motion for leave to file an amended complaint was denied by order of July 22, 2005.

On appeal to the Court of Appeals for the Sixth Circuit, plaintiffs raised several grounds. The court addressed only one ground - whether a civil RICO plaintiff must allege common law fraud - and held that he must, citing *Bender,* supra. It affirmed the dismissal. However, the panel unanimously indicated plaintiffs' argument was legitimate and urged this Court to address the issue.

I.

A CIVIL RICO PLAINTIFF WHO ALLEGES VIOLATION OF THE MAIL FRAUD STATUTE SHOULD NOT BE REQUIRED TO ALLEGE HE RELIED ON DEFENDANTS' MISREPRESENTATION MADE TO HIM, WHERE HE ALLEGES OR SHOWS DEFENDANTS' FRAUDULENT SCHEME PROXIMATELY INJURED HIM

The Racketeer Influenced Corrupt Organization Act (RICO) provides at 18 U.S.C. §1962(c), Prohibited Activities:

> (c) It shall be unlawful for any person employed by or associated with any enterprise... to conduct... such enterprise's affairs through a pattern of racketeering activity... (Apx 73)

§1961(1) defines "racketeering activity" to include "any act which is indictable" under the mail fraud statute of title 18 of the United States Code, §1341. Mail fraud is, in the parlance of RICO litigation, a predicate act. A plaintiff is required by §1962(c) to allege a sufficient number of predicate acts of racketeering to form a "pattern of racketeering activity." (Apx 73)

Plaintiffs alleged defendants committed mail fraud in a pattern of racketeering activity, fraudulently depriving them of their workers compensation benefits. They sought a civil remedy under 18 U.S.C. §1964.

Plaintiffs argue their pleadings sufficiently alleged mail fraud because they showed defendants' fraudulent scheme directly deprived them of workers' compensation benefits, and defendants used the mails in furtherance of that scheme. *Plaintiffs need not show the mailings misrepresented anything; innocent mailings in furtherance of a scheme to defraud should be sufficient in a civil RICO action based on the mail fraud statute.*

Alternatively, plaintiffs argue the proposed amended complaint properly alleged predicate acts of mail fraud because it alleged defendants mailed misrepresentations to a third person (the Workers Compensation Agency), which proximately injured them. Plaintiffs assert the misrepresentations need not have been made to them, and they need not have relied on the misrepresentations, as long as the misrepresentations proximately damaged them.

The Sixth Circuit rejected plaintiffs' claims because in 1984 it held the plaintiffs cannot maintain a civil RICO action absent allegations of common law fraud: the plaintiffs must allege defendants made misrepresentations or omissions of material facts to them, and they relied on those misrepresentations or omissions to their detriment, citing *Bender v Southland Corp*, 749 F2d 1205, 1216 (CA 6 1984). Plaintiffs asked the Sixth Circuit to overturn *Bender*, but the court answered:

> This, we are forbidden to do. In the Sixth Circuit, as well as all other federal circuits, one panel cannot overrule a prior panel's published decision. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or

this Court sitting en banc overrules the prior decision.

Plaintiffs now ask this court to overrule the Sixth Circuit rule requiring them to allege common law fraud, because *Bender* conflicts with -

A. the express language of RICO;

B. the remedial purpose of RICO;

C. this Court's statement in *Holmes*, supra, at footnote 19, that a RICO civil suit may be maintained despite the absence of common law fraud where plaintiffs can prove proximate cause; and

D. decisions of other courts of appeal.

A.

THE RICO STATUTE REQUIRES A PLAINTIFF TO ALLEGE AN ACT "INDICTABLE" UNDER THE MAIL FRAUD STATUTE, NOT COMMON LAW FRAUD

The RICO statute does not contain a requirement that plaintiff allege common law fraud. §1961(1) defines "racketeering activity" to include an act "indictable" under18 U.S.C. §1341. This Court has held that common law fraud is not required for an act to be indictable in a prosecution alleging violation of the mail fraud statute. Reliance on a misrepresentation is not required, *Neder v US*, 527 US 1, 119 S Ct 1872, 144 L Ed 2d 35 (1999) ("reliance has no place in a prosecution under the mail or wire fraud statutes").

Nothing in the RICO statute places a higher burden on plaintiff in a civil suit than is placed upon the government in a prosecution. "As defined in the statute, racketeering activity consists not of acts for which the defendant has been convicted, but of acts for which he could be." *Sedima, S.P.R.L. v Imrex Co, Inc.* 473 US 479, 488; 105 S Ct 3275, 3281; 87 L Ed2d 346 (1985).

Neder, supra, said

> The common law requirements of "justifiable reliance" and "damages," for example, plainly have no place in the federal fraud statutes. See, eg, United States v Stewart, 872 F. 2d 957, 960 (CA 10 1989) ("[Under the mail fraud statute,] the government does not have to prove actual reliance upon the defendant's misrepresentations"); United States v Rowe, 56 F. 2d 747, 749 (CA 2 1932) (L. Hand, J) ("Civilly of course the [mail fraud statute]would fail without proof of damage, but that has no application to criminal liability"), cert denied, 286 US 554, 52 S Ct 579, 76 L Ed 1289 (1932). *Neder*, supra, 527 US at 24.

The language of 18 U.S.C. §1841 contemplates that a misrepresentation to the plaintiff is merely one avenue for violating the statute. The language is in the disjunctive, and permits schemes not involving misrepresentation, such as those alleged by Mr. Brown and his co-plaintiffs:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, ***or*** for obtaining money or property by means of false or fraudulent

> pretenses, representations or promises..."

Bender, supra, demands plaintiff allege more than the RICO and mail fraud statutes require. *Bender* conflicts with the express language of the statute and should be reversed.

Justice Thomas, dissenting in *Anza*, supra, wrote that reliance should not be required in a civil RICO case based on mail fraud because reliance is not an element in the RICO statute:

> ....I must proceed to the question which the Court does not reach: whether reliance is a required element of a RICO claim predicated on mail or wire fraud, and if it is, whether that reliance must be by the plaintiff. The Court of Appeals held that reliance is required, by that "a RICO claim based on mail fraud may be proven where the misrepresentations were relied on aby a third person rather than the plaintiff." 373 F. 3d. At 262-263. I disagree with the conclusion that reliance is required at all. In my view the mere fact that the predicate act underlying a particular RICO violation happens to be fraud offenses does not mean that reliance, an element of common-law fraud, is also incorporated as an element of a civil RICO claim.
>
> Petitioners are correct that the common law generally required a showing of justifiable reliance before a plaintiff could recover for damages caused by fraud. See *Neder v United States*, 527 U.S. 1, 24-25 (1999); Prosser &

Keeton, §105, at 728. But RICO does not confer on private plaintiffs a right to sue defendants who engage in any act of common-law fraud; instead, racketeering activity includes, as relevant to this case, "any act which is indictable under [18 U.S.C.§]1341 (relating to mail fraud) [and §]1343 (relating to wire fraud." §1961(1) (2000 ed., Supp III). And we have recognized that these criminal fraud statutes "did not incorporate *all* the elements of common-law fraud." *Neder,* 527 U.S. at 24. Instead, the criminal mail fraud statute applies to anyone who "having devised or intending to devise any scheme or artifice to defraud... for the purpose of executing such scheme or artifice or attempting to do so, places in any post office... any matter or thing whatever to be sent or delivered by the Postal Service..." §1341. See §1343 (similar language for wire fraud). We have specifically noted that "[b]y prohibiting the 'scheme to defraud,' rather than the completed fraud, the element of reliance....would clearly be inconsistent with the statute Congress enacted." *Id*, at 25.

Because an individual can commit an indictable act of mail or wire fraud even if no one relies on his fraud, he can engage in a pattern of racketeering activity, in violation of §1962, without proof of reliance. Accordingly, it cannot be disputed that the Government could

> prosecute a person for such behavior. The terms of §1964(c)(2000ed) which broadly authorize suit by "[a]ny person injured in his business or property by reason of a violation of section 1962," permit no different conclusion when an individual brings a civil action against such a RICO violator. *Id*, 14-15.

In this case, two of the three panel members expressly agreed with plaintiffs that the RICO statute does not require reliance as an element of a civil suit predicated on mail fraud. The third panel member appeared to agree, in footnote 3: "While we believe the First Circuit's position [in *Systems Management Inc v Loiselle*, 303 F. 3d 100, 104 (CA 1 2002), concluding that RICO's terms "does not require 'reliance' by anyone"] is legitimate, as a subsequent panel applying the law of this circuit we are not empowered to disregard our own precedent in favor of the views of other circuits."

This court should create uniformity among the circuits by holding that a civil RICO claim based on mail fraud does not require proof of reliance by anyone. A civil claim requires only what the statute requires - proof of an act indictable under the mail fraud statute.

B.

CONGRESS' COMMAND THAT THE RICO STATUTE SHALL BE "LIBERALLY CONSTRUED TO EFFECTUATE ITS REMEDIAL

PURPOSE" IS AN IMPORTANT REASON TO REJECT *BENDER'S* RULE REQUIRING A PLAINTIFF TO ALLEGE COMMON LAW FRAUD

Congress directed that RICO "shall be liberally construed to effectuate its remedial purposes," §904(a) of Pub. L. No 91-452, 84 Stat. 947, 18 U.S.C. §note. "Indeed, if Congress' liberal-construction mandate is to be applied anywhere, it is in §1964, where RICO's remedial purposes are most evident." *Sedima,* supra, 473 US at 491 n. 10; 105 S Ct 3283 n. 10; 87 L Ed 2d at 356 n. 10. "The statute's remedial purposes are nowhere more in evidence than in the provision of a private action for those injured by racketeering activity." *Sedima,* supra, 473 US at 498, 105 S Ct at 3286, 87 L Ed 2d at 360. *Bender's* restriction of private actions conflicts with *Sedima's* encouragement of private actions.

The statute was intended to reach not only mobsters, the Court said in *Sedima*, but also legitimate businesses which scheme dishonestly. "Indeed, the Supreme Court has consistently struck down efforts by the courts of appeals to narrow RICO's scope." *Tabas v Tabas,* 47 F3d 1280, 1297 (CA 3 1995).

C.

THIS COURT INDICATED IN FOOTNOTE 19 OF *HOLMES*, SUPRA, THAT RELIANCE BY A PLAINTIFF ON A MISREPRESENTATION MADE TO HIM WAS NOT REQUIRED IF HE PROVED HE WAS PROXIMATELY

INJURED BY DEFENDANT'S FRAUD

Proximate cause is the key. *Holmes* required direct injury before a person could bring a RICO claim, and indicated that once the direct injury requirement was satisfied, the victim of a fraudulent scheme should be able to allege violation of the mail and wire fraud statutes.

In *Holmes*, the Securities Investor Protection Corporation (SIPC), and trustees appointed to liquidate the securities of a bankrupt broker which was an SIPC member, First State Securities Corporation (FSSC), brought suit against Robert Holmes Jr, claiming he participated in a fraudulent scheme leading to the demise of FSSC, which caused SIPC to advance $13 million to cover the claims of FSSC's customers. The suit claimed Holmes violated the mail and wire fraud statutes, and that the acts of Holmes and his co-conspirators amounted to a pattern of racketeering under RICO. The district court dismissed the claims of the SIPC and the trustees on the ground, inter alia, that plaintiff had not satisified the proximate cause requirement under RICO. The United States Court of Appeals for the Ninth Circuit reversed and remanded. This court granted Holmes' petition on the issue "whether SIPC had a right to sue under RICO."

This court noted that a RICO plaintiff must show that defendant's violation was a proximate cause of his injury. The court fleshed out this term of legal art:

> Here we use "proximate cause" to label generically the judicial tools used to limit a person's responsibility for the

> consequences of that person's own acts. At bottom, the notion of proximate cause reflects "ideas of what justice demands, or of what is administratively possible and convenient." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Low of Torts, §41, P. 264 (5th ed. 1984). Accordingly, among the many shapes this concept took at common law, see *Associated General Contractors [of Cal., Inc. V Carpenters,* 459 US 519, 529 (1983)], supra, at 532-533, was a demand for some direct relation between the injury asserted and the injurious conduct alleged. *Holmes*, supra, 503 US at 262

Holmes applied this concept to deny SIPC and the trustees the right to sue under RICO, holding that "the link is too remote" between the actions of the alleged conspirators and the harm suffered by the customers of the defunct brokerage, FSSC. The acts of defendants did not result in a "direct injury" to the customers. These customers, in whose shoes SIPC stood, were "secondary victims" of the conspiracy, and their damages were at best very difficult to assess because of their remoteness in the chain of causation between the conspiracy and their loss. Of critical importance to this case is footnote 19 of *Holmes,* which indicates that a scheme such as Mr. Brown and his co-plaintiffs allege may meet both the proximate cause and pleading requirements of RICO, even though common law fraud is not alleged .

> We further note that SIPC alleged in the courts below that, in late May 1981, Joseph Lugo, an officer of FSSC and

one of the alleged conspirators, parked manipulated stock in the accounts of customers, among them Holmes, who actively participated in the parking transaction involving his account. See Statement of Background and Facts, 1 App. 223-225. Lugo "sold" securities owned by FSSC to customers at market price, and "bought" back the same securities some days later at the same price plus interest. Under applicable regulations, a broker dealer must discount the stock it holds in its own account, see 17 CFR § 240.15c3-1(c)(2)(iv)(F)(1)(vi) (1991), and the sham transactions allowed FSSC to avoid the discount. But for the parking transactions, FSSC would allegedly have failed capital requirements sooner; would have been shut down by regulators; and would not have dragged Sebag with it in its demise. 1 App. 231. Thus, their customers would have been injured to a lesser extent. *Id.*, at 229, 231. *We do not rule out that, if, by engaging in the parking transactions, the conspirators committed mail fraud, wire fraud, or "fraud in the sale of securities," see 18 U.S.C. §§ 1961(1)(B) and (D) (1988 ed., Supp. I), the broker dealers' customers might be proximately injured by these offenses.* See, *e. g.*, *Taffet* v. *Southern Co.*, 930 F. 2d 847, 856-857 (CA11 1991); *County of Suffolk* v. *Long Island Lighting Co.*, 907 F. 2d 1295, 1311-1312

> (CA2 1990). However this may be, SIPC in its brief on the merits places exclusive reliance on a manipulation theory, and is completely silent about the alleged parking scheme. [emphasis supplied]

The cited pages of *County of Suffolk* and *Taffet* approved RICO mail fraud complaints which did not allege common law fraud. In those cases, utility customers alleged utility officers made fraudulent representations in rate proceedings before state commissions, thereby causing unwarranted rate increases. *The courts of appeal held the customers alleged proximate cause, even though no misrepresentations were made to them by defendants.*

Bender, which restricts RICO mail fraud claims to common law fraud, conflicts with *Holmes'* approval of *County of Suffolk* and *Taffet.* Footnote 19 of *Holmes* indicates that plaintiffs who plead an injury proximately caused by defendants' fraudulent scheme, have properly *Holmes* indicates, plead a civil RICO cause of action even if they have not relied on a misrepresentation made to them.

D.

THE RULING OF THE SIXTH CIRCUIT CONFLICTS WITH THE DECISIONS OF SEVEN OTHER CIRCUITS

1. The Rule of the First, Third, Eighth, Ninth and Eleventh Circuits

Several courts of appeal have held that a civil RICO suit alleging mail fraud does not require plaintiff to allege defendant committed an act of common law fraud, but that he allege only that defendant committed an act indictable under 18 U.S.C. §1341 which proximately injured him. Noting the broad reach of RICO, at least three circuits have held that a scheme may constitute civil RICO mail fraud it even if it does not involve *any* mailed misrepresentation, as long as plaintiff can show defendants' dishonest scheme proximately caused him loss, and the mails were used in furtherance of the scheme:

> In *Systems Management, Inc, v Loiselle*, 303 F 3d 100, 104 (CA 1 2002), plaintiff janitorial workers alleged that Loiselle, owner of a competing janitorial company, paid his workers less than the required prevailing wage to clean offices in a college, and that Loiselle falsely represented to the college that he paid the required wage. Plaintiffs filed a civil RICO case claiming they lost employment due to defendant's fraudulent scheme, which included mail fraud. Loiselle asserted he was entitled to dismissal because plaintiffs had not pled reliance on the misrepresentations. The First Circuit rejected the argument:
>
> > It is true that at common law, a civil action for fraud ordinarily requires proof that the defrauded plaintiff relied upon the deception, and some courts have imported this requirement into RICO actions where the predicate acts comprise mail or wire fraud. But RICO bases its own brand of civil liability

> simply on the commission of specified criminal acts - here, criminal fraud - so long as they comprise a "pattern of racketeering activity"; and criminal fraud under the federal statute does not require 'reliance' by anyone; it is enough that the defendant sought to deceive, whether or not he succeeded. See *Neder v United States*, 527 US 1, 119 S Ct 1872, 144 L Ed 2d 35 (1999). ("The common-law requirement[] of 'justifiable reliance' has no place in the federal fraud statutes.")
>
> ...Congress structured its civil remedy to allow recovery for harm caused by defined criminal acts, including violation of section 1341; and, as noted, the federal mail fraud statute does not require reliance. Thus, under a literal reading of RICO – the presumptive choice in interpretation – nothing more than the criminal violation and resulting harm is required.
>
> ***
>
> ...There is no good reason her to depart from RICO's literal language by importing a reliance requirement into RICO. *Id*, 303 F3d 104

Abels v Farmers Commodities Corp, 259 F 3d 910, 918 (CA 8 2001): "A plaintiff may, but need not, allege that a defendant made misrepresentations of fact. [citation] Because misrepresentations of fact are not necessary to the offense, it follows that no misrepresentations need by transmitted by mail or wire; even routine business communications in these media may suffice to make a scheme of false dealing into a federal offense." *Id*, 918.

- *Schreiber Distributing v Serv-Well Furniture Co,* 806 F2d 1393, 1400 (CA 9 1986): Plaintiffs must show "(1) The defendants formed a scheme or artifice to defraud; (2) the defendants used the United States mails or caused a use of the US mails in furtherance of the scheme; and (3) the defendants did so with the specific intent to deceive or defraud... This is consistent with the purpose of the statutes, which is to proscribe the use of the mails or wires in any situation where it is closely entwined with fraudulent activity."
- In *Tabas v Tabas,* 47 F3d 1280, 1294 (CA 3 1995), defendants were executors of an estate. The Third Circuit held that each time defendants made a questionable charge or received compensation to which they were not entitled, they committed acts of mail fraud. Citing *Schmuck v United States,* 489 US 705, 715, 109 S Ct5 1443, 1450, 103 L Ed 2d 734 (1989), the court held that completely innocent mailings in furtherance of this fraud can supply the mailing element in a RICO claim based on 18 U.S.C. §1341.
- *Taffett v The Southern Co*, 930 F. 2d 847 (CA11 1991) - cited with approval by this court in *Holmes*, supra, at footnote 19 - involved a claim that a utility fraudulently overstated its expenses and understated its income so that it could obtain higher rates from the state Public Service Commission. Several utility customers

filed a civil RICO claim, alleging defendant used the mails in furtherance of this fraudulent scheme. The court of appeals did not squarely address whether common law fraud was an element of a civil RICO claim; it simply held that use of the mails in service of the fraud is sufficient to state a claim:

> To state a claim under RICO, the plaintiffs must allege that the defendants engaged in racketeering activity which is defined under Sec. 1961(1) of RICO to mean specified predicate acts, including mail fraud and wire fraud. The plaintiffs in both cases at bar have alleged use of the mail to perpetuate the fraud. *Supra*, at 856.

This Court should adopt the rule of these courts and hold that a mailed misrepresentation is not a required element of a civil RICO mail fraud claim. A plaintiff's pleadings should suffice where he alleges or shows a fraudulent scheme proximately caused him damage, and the mails were used in furtherance of the scheme. *Sedima's* injunction that RICO's civil action provision be liberally construed ordains such pleadings, and such pleadings satisfy *Holmes'* requirement that defendants' acts proximately harmed the plaintiff.

Mr. Brown and his co-plaintiffs' pleadings meet the requirements of the rule enunciated by the Eighth, Ninth, and Third Circuits, because they alleged Cassens and Crawford & Company cut off their benefits under false pretenses (claiming they had no proof of disability when they did, or obtaining false medical reports which said a plaintiff was not disabled when he was); (2) defendants mailed the Notices of Dispute and the medical reports in furtherance of the scheme; and (3) defendants' scheme directly deprived them of their workers compensation benefits and caused them attorney fee expense.

Plaintiffs' pleadings also satisfied this Court's concern, expressed in *Holmes,* supra, that a civil plaintiff plausibly allege he was directly damaged by defendant's fraud. Plaintiffs alleged they were the direct target of defendants's scheme, and that defendants directly injured them by cutting off or denying their benefits and causing them the expense of hiring an attorney to recover their benefits. Plaintiffs alleged proximate cause.

2. The Rule of the Second, Fourth, and Fifth Circuits

Other circuits have required a plaintiff claiming mail fraud to allege or show a mailed misrepresentation, but have held a mailed misrepresentation to a third person was sufficient.

County of Suffolk v Long Island Lighting Co, 907 F. 2d 1295 (CA 2 1990) involved false testimony to public utility commission by a utility official which resulted in commission approval of higher rates. The court held utility customers stated a civil RICO claim if proximate cause is present ("the RICO pattern or acts proximately cause a plaintiff's injury if they are a substantial factor in the sequence of responsible causation"), supra at1311. This Court cited this holding with approval in footnote 19 in *Holmes*, supra.

The Fifth Circuit held a plaintiff sufficiently alleged RICO mail fraud where the false statements were directed not to him but to customers in the marketplace in which he competed, which the customers relied on to the damage of plaintiff. *Procter & Gamble Company v Amway Corp,* 242 F3d 539, 546-5 (CA 5 2001). Plaintiff alleged Amway Corporation lured away its customers by spreading false rumors that it was linked to Satanism. The court held this pleading sufficient:

> ....a target of a fraud that did not itself rely on the fraud may pursue a RICO claim if the other elements of proximate causation are present. *Procter & Gamble,* supra, 565.

See also *Mid Atlantic Telecom, Inc v Long Distance Services, Inc*, 18 F 3d 260, 263 (CA 4 1994).

The proposed amended pleadings of plaintiffs' are sufficient under *Procter & Gamble*, *Summit*, and *Atlantic Telecom.* They alleged or showed they were proximately injured by defendants' fraud, even though the misrepresentations were made to the Workers Compensation Agency and not to them.

The false statements contained in the Notices of Dispute issued by Crawford & Company were directed to officials of the Michigan Workers Compensation Agency. The statements misled the Agency as to the basis for defendants' cut-off of benefits. Crawford & Company falsely and repeatedly represented to the Agency that there was a proper basis for the denial of plaintiffs' benefits.

The false statements proximately injured plaintiffs. Because the Notices of Dispute did not tell the Agency the true and improper reasons for the cut-offs of benefits, the Agency took no action against defendants, and defendants were able to continue wrongfully withholding benefits.[8] Under *Procter & Gamble, Mid Atlantic Telecom* and *Systems Management,* Crawford & Company's false statements to the Agency fulfill the misrepresentation requirement in a RICO claim of mail fraud.

However, the decisions of the Second, Fourth and Fifth Circuits are not compatible with this Court's rulings insofar as they *require* reliance on a misrepresentation by a third person. Reliance on a misrepresentation is not a requirement of the mail fraud statute. *Neder*, supra, said so. "The common law requirements of "justifiable reliance" and "damages," for example, plainly have no place in the federal fraud statutes." *Neder*, supra, 527 US at 24.

The text of the RICO statute is instructive on the issue of whether reliance or a mailed false statement are requirements of a civil action. Section 18 U.S.C. §1851 states

"racketeering activity" means..... (B)

8

[8] Plaintiffs claim that had the Notices of Dispute told the truth - for example, "Crawford & Company is stopping Paul Brown's benefits on the ground it has no proof of disability although it does have proof of disability" - the Agency would have taken action under §631(1) of the WDCA, MCL 418.631(1), which provides for revoking an insurer's Michigan license "if any insurer licensed to transact the business of workmen's compensation insurance within this state.... unreasonably fails to pay promptly claims for compensation for which it shall become liable." (Apx 76) The Agency could also have taken action against Crawford under the penalty provision of §801 of the WDCA, MCL 418.801. Note also that the Notice of Dispute warns at the bottom of the form that "[m]aking a false or fraudulent statement for the purpose of... *denying benefits* can result in criminal or civil prosecution, or both..." and cites WDCA sections 801 and 631, as well as rule R408.33. (Apx 68)

> any act which is indictable under any of the following provisions of title 18, United States Code: .... section 1341 (relating to mail fraud), section 1343 (relating to wire fraud).....

Congress did not say that a plaintiff in a civil suit must allege more than the government is required to allege in a prosecution. Congress said a plaintiff must allege an "act which is indictable." Because the government in a mail fraud prosecution is not required to allege either reliance, *Neder*, supra, or a mailed misrepresentation, *Schmuck,* supra, neither are plaintiffs in their civil suit.

This Court should rule that a civil RICO plaintiff has sufficiently plead a cause of action where he has alleged or showed defendants' fraudulent scheme directly caused him loss, and defendants used the mails or wires in furtherance of the scheme. Such a rule complies with the holdings of this court in *Neder*, *Schmuck*, *Sedima*, and *Holmes*, supra.

RELIEF REQUESTED

Paul Brown and his co-plaintiffs request this court to hold their Complaint and First Amended Complaint alleged civil RICO causes of action for mail and wire fraud against Cassens and Crawford & Company, and to reverse the dismissal entered by the trial court and affirmed by the court of appeals.

____
Marshall Lasser
Attorney for petitioners

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Supreme Court, U.S.
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OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

PAUL BROWN, et al.,
Petitioners,

v

CASSENS TRANSPORT CO., et al.

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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No. 05-2089

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL BROWN, ET AL.,

Plaintiffs-Appellants,

v.

CASSENS TRANSPORT COMPANY, ET AL.,

Defendants-Appellees,

AMENDED ORDER

Filed: December 20, 2007

BEFORE: MOORE and GIBBONS,
Circuit Judges; and
ACKERMAN,*
District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Moore would grant rehearing for the reasons stated in her opinion

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

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* Hon. Harold A. Ackerman, Senior United States District Judge for the District of New Jersey, sitting by designation.

No. 05-2089

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL BROWN, ET AL.,

Plaintiffs-Appellants,

v.

CASSENS TRANSPORT COMPANY, ET AL.,

Defendants-Appellees,

ORDER

Filed: December 17, 2007

BEFORE: MOORE and GIBBONS,
Circuit Judges; and
ACKERMAN,**
District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the panel member but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

---

* Hon. Hoarold A. Ackerman, Senior United States District Judge for the District of New Jersey, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 05.2089

PAUL BROWN, WILLIAM FANALY,
CHARLES THOMAS, GARY RIGGS,
ROBERT ORLIKOWSKI, and
SCOTT WAY,

Plaintiff's-Appellants,

v.

CASSENS TRANSPORT CO., CRAWFORD
& COMPANY, and DR. SAUL MARGULES,

Defendants-Appellees.

Before: MOORE and GIBBONS, Circuit
Judges; ACKERMAN, District Judge.

Filed: July 10, 2007

JUDGMENT

On Appeal from the United States District Court
For the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206
File Name: 07a0257p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI, and SCOTT WAY,
Plaintiffs-Appellants, No. *05-2089*

v.

CASSENS TRANSPORT CO., CRAWFORD & COMPANY, and DR. SAUL MARGULES,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 04-72316-Paul D. Borman, District Judge.
Argued: July 27, 2006

Decided and Filed: July 10, 2007

Before: MOORE and GIBBONS, Circuit Judges; ACKERMAN, District Judge. (The Honorable Harold A. Ackerman, Senior United States District Judge, for the District of New Jersey, sitting by designation)

COUNSEL

ARGUED: Marshall D. Lasser, LAW OFFICE OF MARSHALL LASSER, Southfield, Michigan, for Appellants. Janet E. Lanyon, DEAN & FULKERSON, Troy, Michigan, Joan N. Pierson, THE WILLIAMS FIRM, Grand Blanc, Michigan, for Appellees. **ON BRIEF:** Marshall D. Lasser, LAW OFFICE OF MARSHALL LASSER, Southfield, Michigan, for Appellants. Janet E. Lanyon, DEAN & FULKERSON, Troy, Michigan, Timothy R. Winship, THE WILLIAMS FIRM, Grand Blanc, Michigan, for Appellees.

GIBBONS, J., delivered the opinion of the court, MOORE, J. (pp. 7- 10), delivered a separate opinion concurring in part and dissenting in part. ACKERMAN, D. J. (pp. 11-12), delivered a separate concurring opinion.

OPINION

JULIA SMITH GIBBONS, Circuit Judge. Plaintiffs-appellants Paul Brown, William Fanaly, Charles Thomas, Gary Riggs, Robert Orlikowski, and Scott Way ("plaintiffs") filed suit in federal district court against defendants-appellees Cassens Transport Company ("Cassens"), Crawford & Company ("Crawford"), and Dr. Saul Margules ("defendants") alleging that defendants employed mail and wire fraud in a scheme to deny them worker's compensation benefits promised under the Michigan Worker's Disability Compensation Act ("WDCA"), Mich. Comp. Laws § 418.301, and raising federal and state law claims. On defendants' motion, the district court dismissed plaintiffs' complaint for failure to state a claim on which relief could be granted. Fed. R. Civ. P. 12(b)(6).

For the reasons below, we affirm.

I.

Plaintiffs are current or former employees of Cassens who submitted worker's compensation claims to Cassens based on injuries they claim to have sustained while performing work-related tasks. It is uncontested that Cassens, which is self-insured for purposes of paying benefits under the WDCA, contracted with Crawford to serve as a claims adjuster for the worker's compensation claims of Cassens's employees. According to plaintiffs, Cassens and Crawford deliberately selected and paid unqualified doctors, including Margules, to give fraudulent medical opinions that would support the denial of worker's compensation benefits. Plaintiffs further assert that Cassens and Crawford ignored other medical evidence demonstrating that plaintiffs' injuries were work related and thus compensable under the WDCA. Plaintiffs accuse defendants of wrongfully denying or ceasing worker's compensation benefits payable to them as a result of their injuries.

On June 22, 2004, plaintiffs filed suit against Cassens, Crawford, and Margules in federal district court, claiming violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961(1)(B), 1962(c), 1964(c). Plaintiffs asserted in their complaint that defendants sent fraudulent communications among themselves and to plaintiffs by mail and wire in violation of 18 U.S.C. §§ 1341, 1343; those allegations of mail and wire fraud constituted the predicate acts for plaintiffs' RICO claims. Plaintiffs also raised a state law claim of intentional infliction of emotional distress. Defendants moved for dismissal pursuant to Fed. R.

Civ. P. 12(b)(6), and, on July 15, 2005, the district court granted that motion. *Brown v. Cassens Transp. Co.*, 409 F. Supp. 2d 793 (E.D. Mich. 2005). On the same day the district court issued its dismissal order, plaintiffs filed a motion for leave to file an amended complaint. The court entered judgment in favor of defendants on July 18, 2005, and denied plaintiffs' motion to file an amended complaint on July 22, 2005.

Plaintiffs filed this timely appeal.

II.

We review *de novo* a district court's Rule 12(b)(6) dismissal for failure to state a claim upon which relief can be granted. *Hill v. Blue Cross & Blue Shield of Mich., 409* F.3d 710, 716 (6th Cir. 2005). The plaintiffs' Actual allegations are taken as true and the complaint is viewed in the light most favorable to the plaintiffs. Id. We will not affirm the district court's dismissal of a complaint on Rule 12(b)(6) grounds "unless it appears beyond doubt that the plaintiffs] can prove no set of facts in support of [their] claim[s] which would entitle [them] to relief." Id. (alteration in original) (internal quotation marks omitted).

III.

Title 18, Section 1962 of the United States Code makes it unlawful for an individual "employed or associated with an enterprise" engaged in activities relating to interstate or foreign commerce "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." 18 U.S.C. § 1962(c). The term "racketeering activity" includes, among other things, any act indictable under the federal mail fraud, 18 U.S.C. § 1341, or wire fraud, 18 U.S.C. § 1343, statutes. 18 U.S.C. § 1961. In addition to providing criminal penalties for certain racketeering activities, RICO provides a private right of action and treble damages for "[a]ny person injured in his business or property by reason of a violation of section 1962 . . . ." 18 U.S.C. § 1964(c).

On appeal, plaintiffs challenge the district court's decision to dismiss their RICO claims on the ground that they failed to plead detrimental reliance on the defendants' alleged misrepresentations concerning the cause of their injuries. As plaintiffs acknowledge, the well-established precedent of this circuit requires that a civil RICO plaintiff alleging mail or wire fraud plead reliance, that is, that a defendant made fraudulent representations to the plaintiff on which the plaintiff relied. *See, e.g., VanDenBroeck v. CommonPoint Mortgage Co.*, 210 F.3d 696, 701 (6th Cir. 2000); *Cent. Distribs. of Beer, Inc. v. Conn*, 5 F.3d 181, 184 (6th Cir. 1993); *Blount Fin. Servs., Inc. v. Walter E. Heller & Co.*, 819 F.2d 151, 152 (6th Cir. 1987); *Bender v. Southland Corp.*, 749 F.2d 1205, 1216 (6th Cir. 1984). Plaintiffs urge us to depart from these prior holdings and reverse the district court, proposing an alternative rule that eliminates the reliance requirement and permits a successful RICO claim based on mail or wire fraud where a plaintiff alleges that a defendant made a misrepresentation to a third person that was the proximate cause of an injury to the plaintiff. Because our precedent expressly requires a shooing of reliance and thus forecloses the rule plaintiffs propose, we must affirm the district court's judgment.

In their effort to persuade us to discard the reliance requirement in our RICO jurisprudence, plaintiffs point to both Supreme Court precedent and the case law of our sister circuits. Neither source compels the result plaintiffs urge, however. We begin with the two decisions of the Supreme Court on which plaintiffs rely: *Neder v. United States*, 527 U.S. 1 (1999), and *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). Plaintiffs cite the Court's decision *Neder* as support for the proposition that reliance is an inappropriate element in civil RICO actions based upon mail or wire fraud. In so doing, plaintiffs rely exclusively upon a single statement in the Court's extensive *Neder* opinion, namely, the Court's observation that the common law's requirement of justifiable reliance "plainly ha[s] no place in the federal fraud statutes." 527 U.S. at 24-25. Although plaintiffs place great emphasis on this one statement, we deem this remark insufficient to warrant a reversal of Sixth Circuit precedent. *Neder* is a criminal case that speaks to the elements of criminal bank, mail, and wire fraud under 18 U.S.C. §§ 1344, 1341, and 1343, the predicate acts for the criminal RICO charges there. *Id.* at 6. The opinion reiterates a common understanding of the elements of these federal criminal statutes over a long period of time. Indeed, the Court's passing comment reflects the law in our circuit since at least 1930, *see, e.g.*, *Hyney v. United States,* 44 F.2d 134,136 (6th Cir. 1930), and we are aware of no court taking a contrary position.[1] *Neder* provides us with little insight, however, into the proof necessary for a successful civil RICO claim. While one could reasonably conclude that the absence of reliance as an element of criminal mail and wire fraud might suggest that reliance should not be required to establish a civil RICO claim when the predicate acts alleged are mail or wire fraud, our circuit has concluded otherwise. Although we may quarrel with the soundness of that conclusion, we must acknowledge that precedent from the criminal context and *Neder* in particular do not preclude the inclusion of an additional element for a plaintiff's civil claim.

Neder's irrelevance to the matter before us becomes clear upon closer review of the reliance requirement's place within the larger civil RICO jurisprudential framework. The law is clear that once a civil RICO plaintiff has made the necessary showing of a RICO violation under 18 U.S.C. § 1962, he must still meet those particular requirements imposed on private parties pursuing remedies under § 1964, including demonstrating RICO standing by showing causation. *Holmes v. Secs. Investor Prot. Corp., 503* U.S. *258,268-69* (1992) (noting that proximate causation is required to demonstrate harm "by reason of' wrongful actions); *see also Cent. Distribs. of Beer,* 5 F.3d at 184 (assuming *arguendo* that plaintiffs pled the acts of mail and wire fraud with particularity but finding summary judgment appropriate because of the absence of evidence that defendant made representations to the victim and that victim "relied on any statement or omission to its detriment"). As this court explained in *Chaz Constr., LLC v. Codell,* our cases have determined that part of RICO standing is the ability to demonstrate reliance on any alleged wrongful conduct. 137 F. App'x 735, 738 (6th Cir. 2005) (citing *Cent. Distribs.*, 5 F.3d at 184).

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[1] Epstein v. United States, 174 F.2d 754, 765-66 (6th Cir. 1949), does contain language suggesting that criminal mail fraud requires that someone actually have been defrauded. However, *Epstein* is simply wrong and contrary to our prior precedent. Subsequent panels were thus under no obligation to follow it. *See Habich v. City of Dearborn,* 331 F.3d 524, 530 n.2 (6th Cir. 2003). The dissent contends that because *Bender* relied upon *Epstein*, a case we agree was in error, we may disregard all subsequent cases espousing the principle articulated in *Bender*. We disagree. Although *Epstein* may have provided a citation for the initial case outlining the reliance requirement for civil RICO claims, various panels of our court have reaffirmed the requirement. Those panels were free to impose a, reliance requirement upon civil RICO plaintiffs even absent *Bender* and were doubtless aware that reliance is not required for federal criminal mail or wire fraud. The dissent's position requires us to assume that the repeated articulation of a reliance requirement in our civil RICO caselaw was the work of a court unaware of the basic principle that reliance is not an element of criminal mail and wire fraud. We are unable to embrace this presumption.

Nor do we find a basis for eliminating the reliance requirement in the Supreme Court's decision *in Sedima,* a case addressing a separate issue in RICO doctrine. There, the Court directed that "RICO is to be read broadly," noting Congress's "self-consciously expansive language and overall approach" and its direction that RICO "be liberally construed to effectuate its remedial purpose." *Id.* at 498. Plaintiffs insist that this general language compels a disposal of the reliance requirement in our RICO jurisprudence. We disagree. Although we recognize that the Court's statement in *Sedima* endorses a generous reading of RICO's provisions, we find no mandate for reversal of our existing precedent.

Plaintiffs also seek to rely on *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539 (5th Cir. 2001), and *Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc.*, 18 F.3d 260 (4th Cir. 1994), cases in which corporate plaintiffs sought relief under RICO for fraud directed by a competitor at the plaintiffs' customers. Although the courts in both cases adopted a more expansive view of causation, permitting a RICO claim based upon mail or wire fraud directed at a third party to form the basis for a plaintiff's claim, *see* 242 F.3d at 565 and 18 F.3d at 263,[2] neither case holds, as plaintiffs suggest, that a plaintiff seeking a remedy under RICO's civil provisions is not bound to prove reliance upon any alleged fraudulent representation. Indeed, both courts seem to have maintained the necessity of proving reliance, even while allowing reliance by a third party to satisfy the requirement. *See Mid Atlantic*, 18 F.3d at 264 (deferring resolution of the reliance issue until completion of discovery);

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[2] Our court has explicitly rejected this approach, requiring that a plaintiff be the target of any alleged fraud. *See, e.g., Cent. Distribs., 5* F.3d at 184 ("[T]he defendant must make a false statement or omission of fact *to the plaintiff* to support a claim of wire fraud or mail fraud as a predicate act for a RICO claim.... [T]he fraud connected with mail or wire fraud must involve misrepresentations or omissions flowing from the defendant to the plaintiff."). Even if our caselaw were otherwise, it would not alter the result in this case. Plaintiffs concede that their original complaint contained no allegations of reliance by a third party. On appeal, they seek to challenge the district court's July 22, 2005, denial of their motion for leave to file an amended complaint. They insist that the amended filing would have contained sufficient allegations of third-party reliance. However, plaintiffs' notice of appeal is limited to a challenge to the district court's July 15, 2005, order granting defendants' motion to dismiss. It contains no mention of the district court's July 22, 2005, order denying them leave to amend. Because plaintiffs did not properly appeal the July 22 order, we do not address the propriety of the district court's actions. Fed. R. App. P. 3(c)(1)(B) (noting that notice of appeal must "designate the judgment, order, or part thereof being appealed. . . *.");. United States v. Universal Mgmt. Servs., Inc., Corp.*, 191 F.3d 750, 756 (6th Cir. 1999) (noting the "general rule" that "[i]f an appellant ... chooses to designate specific determinations in his notice of appeal-rather than simply appealing from the entire judgment-only the specified issues my be raised on appeal") (internal quotation marks omitted and brackets in original).

Procter & Gamble, 242 F.3d at 565 ("[I]f P&G's customers relied on the fraudulent rumor in making decisions to boycott P&G products, this reliance suffices to show proximate causation."); *see also Sandwich Chef of Tx, Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 222 (5th (hr. 2003) (observing that in *Procter & Gamble,* the court held that "even though Procter & Gamble had not relied on the fraud, if its customers had done so in deciding to boycott its products, this reliance could fall within the narrow exception carved out in *Summit [Props., Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556 (5th Cir. 2000)] and would suffice to show proximate cause"). We think it noteworthy that both the Fourth and Fifth Circuits have since expressly reaffirmed the necessity of a showing of reliance. *See Am. Chiropractic Ass'n v. Trigon Healthcare, Inc.* 367 F.3d *212,* 233 (4th Cir. 2004); *Sandwich Chef,* 19 F.3d at 219; *see also, Bank of China, N.Y Branch v. NBMLLC,* 359 F.3d 171, 176 (2d Cir. 2004), cert. granted in part, 545 U.S. 1138 (2005), cert. dismissed, 126 S. Ct. 675 (2005) ("It is well established in this Circuit that where mail fraud is the predicate act for a civil RICO claim, the proximate cause element articulated in *Holmes* requires the plaintiff to show reasonable reliance.") (internal quotation marks omitted).[3]

We conclude, accordingly, that we must respect our court's precedent requiring a civil RICO plaintiff to plead his reliance upon any alleged misrepresentation when the predicate acts are mail or wire fraud. Even if we accept plaintiffs' view that our RICO jurisprudence has gone astray in imposing a reliance requirement on plaintiffs pursuing private actions under § 1964(c), our mere belief that a prior case was wrongly decided is insufficient to permit reversal of the decision of a previous panel. *See Darrah v. City of Oak Park, 255* F.3d 301, 309 (6th Cir. 2001). Absent a clear directive from the Supreme Court or a decision of this court sitting *en Banc,* we are not at liberty to reverse this court's precedent. Id.

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[3] As to the First Circuit's decision in *Systems Management, Inc. v. Loiselle,* 303 F.3d 100 (1st Cir. 2002), another case on which plaintiffs rely, we acknowledge that the First Circuit has taken a different approach to civil RICO liability, concluding that RICO 's terms "does not require 'reliance' by anyone," id. at 104, and holding that "under a literal reading of RICO-the presumptive choice in interpretation-nothing more than the criminal violation and resulting harm is required," id. While we believe the First Circuit's position is legitimate, as a subsequent panel applying the law of this circuit, we are not empowered to disregard our own precedent in favor of the views of other circuits.

Based on the foregoing, we conclude that the district court's dismissal of plaintiffs' RICO claims was appropriate. Plaintiffs' complaint contains no allegations of reliance by them on misrepresentations by defendants,[4] and, under the law of this circuit, this omission is fatal to plaintiffs' RICO claims. We accordingly affirm the district court's grant of defendants' motion to dismiss plaintiffs' RICO claims.[5]

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[4] Plaintiffs' complaint does contain allegations that they relied on defendants' communications "to the extent [they] suffered the financial loss of having to pay attorney fees, medical care and medical mileage." This formulation defines plaintiffs' reliance by reference to their injury and does not constitute a claim of detrimental reliance on defendants' alleged misstatements.

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[5] We need not address the alternative grounds cited by the district court as appropriate bases for dismissal, including certain plaintiffs' failure to plead fraud with the requisite particularity required under Rule 9 of the Federal Rules of Civil Procedure and the reverse preemption doctrine under the McCarran-Ferguson Act, 15 U.S.C. § 1011-15. *See Williams v. Anderson, 460* F.3d 789, 800 (6th Cir.

IV.

Plaintiffs also challenge the dismissal of their state law intentional inflection of emotional distress claims. In reviewing this matter, the parties agree, we look to the law of Michigan. *See Meridian Mut. Ins. Co. v. Kellman,* 197 F.3d 1178, 1181 (6th Cir. 1999). Under Michigan law, a plaintiff must show the following elements to establish an intentional infliction of emotional distress claim: "(1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Roberts v. Auto-Owners Ins. Co.,* 374 NW.2d 905, 908 (Mich. 1985) (internal quotation marks omitted). The Michigan Supreme Court has described "extreme and outrageous conduct" as follows:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has in-tended to inflict emotional distress, or even that his conduct has been characterized by "malice", or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would

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2006) ("[T]his Court may affirm the district court on any ground supported by the record.").

> arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Id. at 908-09 (internal quotation marks omitted).

In *Roberts,* the Michigan Supreme Court held that a no-fault insurer's "failure ... to facilitate the filing of a replacement services claim, a delay of at most six months in responding to the claim as filed, and the denial of benefits owed" was insufficient to meet the standard for outrageous conduct. Id. at 911. In arriving at this conclusion, the court noted that "[t]here is no indication that [the insurer] set out to harass these plaintiffs, nor does the evidence disclose a course of conduct that may fairly be characterized as so outrageous in character. . . as to go beyond all possible bounds of decency. . . ." Id. (internal quotation marks omitted).

We conclude here that the plaintiffs' allegations of defendants' fraudulent denial of worker's compensation benefits are not "so outrageous in character ... as to go beyond all possible bounds of decency." Id. Decisions of the Michigan Court of Appeals confirm this conclusion. That court has explained that the "wrongful, bad faith termination of benefits, by itself, is not sufficiently outrageous to support a claim for intentional infliction of emotional distress." *Atkinson v. Farley,* 431 NW.2d 95, 97 (Mich. Ct. App. 1988). Even the wrongful denial of worker's compensation benefits "to further some ulterior motive of the defendants," as the plaintiffs here allege, is insufficiently outrageous to support an intentional infliction of emotional distress claim under Michigan law. *Lisecki v. Taco Bell Rests., Inc., 389* N.W.2d 173, 175 (Mich. Ct.App. 1986). For these reasons, dismissal of the plaintiffs' intentional infliction of emotional distress claims was proper.

V.

For the reasons set forth above, we affirm the judgment of the district court.

CONCURRING IN PART, DISSENTING IN PART

KAREN NELSON MOORE, Circuit Judge, concurring in part and dissenting in part. I agree with the majority opinion's conclusions regarding plaintiffs' state-law claims for intentional infliction of emotional distress. I disagree, however, with the majority opinion's conclusion that civil-RICO plaintiffs must plead (and prove) reliance. Accordingly, I respectfully dissent.

I acknowledge that prior opinions of this court have stated that civil-RICO plaintiffs must plead (and than prove) reliance. See; e.g., *Cent. Distribs. of Beer, Inc. v. Conn*, 5 F.3d 181, 184 (6th Cir. 1993), *cert. denied,* 512 U.S. 1207 (1994); *Blount Fin. Servs. v. Walter E. Heller & Co.*, 819 F.2d 151, 152 (6th Cir. 1987); *Bender v. Southland Corp.,* 749 F.2d 1205, 1216 (6th Cir. 1984). These opinions, however, are not necessarily binding precedent. To determine whether they have precedential effect, we must consider the origins of the rule requiring reliance and whether those origins comport with preexisting circuit precedent. *Salmi v. Secy of Health & Human Servs.*, 774 F.2d 685, 689 (6th CAr. 1985) (court's earliest decision on an issue remains controlling unless overruled by the court sitting en banc or unless the United States Supreme Court requires modification of the decision).

These prior panels could have reached the conclusion that reliance is an element of a civil-RICO cause of action for mail or wire fraud in only one of three possible ways: (1) they could have interpreted the text of the mail- and wire-fraud statutes; (2) they could have interpreted the text of RICO; or (3) they could have decided sua sponte to add an element. I consider these options in reverse order.

After reviewing the cases, I do not think that the prior panels sua sponte added an element to a civil-RICO claim. First, I do not believe those panels had the authority to do so. Although the majority opinion claims that the *Central Distributors, Blount Financial Services,* and *Bender* "panels were free to impose a reliance requirement upon civil RICO plaintiffs," Maj. Op. n.1, it cites no case in support of this proposition. Indeed, I know of no such case. The Supreme Court recently rejected a nearly identical proposition when it unanimously reversed our Circuit's adoption of pleading requirements unmoored to a statute's text. *Jones v. Bock*,___ U.S.___ 127 *S.* Ct. 910 (2007). If courts are not free to impose additional *pleading requirements* that Congress did not intend, I cannot see how they legitimately can impose new *elements*. Revising legislation in such a manner is a task for Congress, not the courts, especially when the revision is as significant as adding reliance as an element. *See id.* at 926 ("[A]dopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-ease basis by the courts.").

Second, the *Central Distributors, Blount Financial Services, and Bender* panels apparently did not believe they were adding a new element to a civil-RICO claim. Not one of these cases identifies reliance as a newly added element. Nor do the opinions cite any cases indicating that judges of this court are free to add elements to a congressionally created cause of action (the same proposition for which the majority opinion was unable to find support). If a panel of this court were to venture into such uncharted territory, I would expect the resulting opinion to explain in detail why the panel thought it had the power to revise Congress's work by adding an element, as well as why the panel thought it prudent in that instance to do so. The above-listed opinions contain no such explanation. Considering all this, it seems highly unlikely that the panels intended to create a new element, thereby judicially amending the statute.

Similarly, these prior panels could not have been interpreting the text of the RICO statute. First, not one identifies any language in RICO (or any legislative history) indicating that Congress intended to require that civil-RICO plaintiffs prove reliance. Second, RICO's text forecloses such a requirement. To establish a civil-RICO cause of action, 18 U S.C. § 1964(c) requires only (1) an injury to the plaintiff (2) "by reason of a violation of § 1962.[6] As relevant

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[6] The Supreme Court has interpreted § 1964(c)'s "by reason of 'language to establish that proximate causation is an element to a civil-RICO claim. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). This decision, however, does not establish in any way a requirement that the plaintiff relied on a statement offered by the defendant.

Additionally, §1964(c)'s requirement that a civil-RICO plaintiff have been "injured in his business or property" establishes RICO's only standing requirement. *See Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) ("the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation"). Although our unpublished opinion in *Chaz Construction, LLC v. Codell*, 137 F. App'x 735 (6th Cir. 2005) (unpublished), mistakenly cited *Central Distributors* for the proposition that reliance was part of the standing inquiry in a RICO case, *id.* at 738-39, *Central Distributors* said nothing of the sort. Instead, *Central Distributors* cited *Bender* for the proposition that reliance is an *element* here, § 1962 requires only that the plaintiff show that the defendant conducted the affairs of an enterprise "through a .pattern of racketeering activity." 18 U.S.C. § 1962(c). And "racketeering activity," in turn, is defined to include "any act which is *indictable* under ... [18 U.S.C. §] 1341 (relating to mail fraud), [and 18 U.S.C. §] 1343 (relating to wire fraud)." 18 U.S.C. § 1961(1)(B) (emphasis added). Nowhere does the RICO statute suggest that Congress intended to include a reliance requirement applicable to all civil-RICO claims.

After these two possibilities have been eliminated, it becomes clear that the panels in the above-listed opinions construed the mail- and wire-fraud statutes as requiring that plaintiffs prove reliance. *Bender's* analysis demonstrates as much.

The *Bender* panel concluded that the district court properly dismissed the plaintiff's civil RICO claim because "the plaintiffs' complaint [did] not allege what misrepresentations (or omissions) of material fact Southland made to the plaintiffs *that they reasonably relied upon* to their detriment." 749 F.2d at 1216 (emphasis added). *Bender* cites a criminal mail-fraud case for this proposition, *see id.* (citing *United States v. VanDyke, 605* F.2d 220, 225 (6th Cir.), *cert. denied,* 444 U.S. 994 (1979)),[7] which reveals that the

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of a civil-RICO claim. Cent. Distribs., 5 F.3d at 184. Nevertheless, *Chaz Construction* is unpublished and accordingly not binding on us.

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7 Bender also cites another criminal mail-fraud case, *Epstein v. United States,* 174 F.2d 754 (6th Cir. 1949). It appears that *Epstein* may have been the ultimate source of *Bender's* assertion that reliance is required, as *VanDyke* says nothing about reliance. *Van Dyke* noted that "the scheme must involve some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension." 605 F.2d at 225. Accordingly, it did not address reliance, as the quoted passage

Bender panel interpreted the federal mail-fraud statute to require a showing of reliance. However, prior panels of this court had held even earlier that prosecutions under the federal fraud statutes do *not* require a showing of reliance. *Norman v. United States,* 100 F.2d 905, 907 (6th Cir. 1939) (a mail-fraud offense "is complete when the scheme has been devised and when in pursuance of it, the mails have been used"); *Hyney v. United States,* 44 F2d 134, 136 (6th Cir. 1930).

Although it is over seventy-five years old, this early holding-that reliance is *not* required under the federal fraud statutes-has remained constant over time. Within the past decade, the Supreme Court has echoed this holding, noting that a reliance requirement "plainly ha[s] no place in the federal fraud statutes."

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pertains only to the defendant's state of mind, whereas reliance speaks to the plaintiff's state of mind.

Bender cites *Epstein* for two propositions: (1) showing a "scheme to defraud" (an element of mail fraud) requires showing intent to defraud; and (2) the scheme must "accomplish[] the end designed." *Bender,* 749 F.2d at 1216 (quoting *Epstein,* 174 F.2d at 765). These propositions, taken together, were the source of *Bender's* conclusion that reliance is required: the "end designed" could not be accomplished unless the plaintiff relied on the representations. As the majority opinion notes, *Epstein's* position regarding accomplishment of the fraud's ultimate goal is "simply wrong and contrary to our prior precedent," and accordingly unworthy *of* deference. Maj. Op. n.1.

Tracing the civil-RICO precedents back to their origins in "simply wrong" decisions in criminal mail-fraud cases thus demonstrates the ultimate bankruptcy of the majority opinion's position. Even the majority itself recognizes that the genesis of the rule requiring reliance conflicts with prior precedent and accordingly should not be followed.

Neder v. United States, *527* U.S. 1, 2025 (1999).[8] Subsequently, we have also echoed the rule of *Norman and Hyney. United States v. Daniel,* 329 F.3d 480, 486 (6th (25. 2003) (noting that *Neder* "makes it even clearer that actual reliance is not required for mail or wire fraud"). Even the majority opinion notes as much. Maj. Op. at 3 ("we are aware of no court taking a contrary position" to the rule that the government need not establish reliance in a prosecution under the federal mail- and wire-fraud statutes).

The relevant point here is not that *Bender* was wrong (although indeed, it was wrong). Instead, the point is that because the *Bender* panel interpreted the mail-fraud statute to require a showing of reliance (and then applied this requirement in a civil-RICO case), its holding created a direct conflict with *Hyney* and *Norman,* which had previously held that the federal mail-fraud statute has no reliance requirement. Accordingly, in applying the federal mail-fraud statute through a civil RICO action, we are bound to follow *Hyney* and *Norman*, not *Bender*. United States v. *Abboud*, 438 F.3d 554, 567 (6th Cir. 2006) (in case of conflict between two cases, holding of the earlier case is binding); *see also* Maj. Op. n. 1 (noting that when a decision contravenes prior precedent, "[s]ubsequent panels [a]re ... under no obligation to follow it"). The fact that intervening panels have failed to follow our earliest published decision *(Hyney)* is of no moment, as no case holds that, even though one panel cannot overrule a prior panel's decision, *multiple* subsequent

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[8] The majority opinion's attempt to duck *Neder* by acknowledging that it "is a criminal case," Maj. Op. at 3, is unconvincing. As noted above, RICO's civil provisions define the predicate acts of racketeering activity as acts *indictable* under certain federal criminal statutes, and the list specifically includes §§ 1341 and 1343. Accordingly, *Neder* interpreted the same text that the majority opinion purports to interpret today.

decisions are sufficient to undermine a prior panel's holding. Accordingly, it is unsurprising that the majority opinion musters no support for its contention that the reliance requirement may stand, notwithstanding its origins in *Epstein,* because "various panels of our court have reaffirmed the requirement." Maj. Op. n.1.

The prior-panel rule exists to prevent *Bender's* unjustified departure from *Hyney* and *Norman,* not to ossify *Bender's* error once rendered. Because *Bender* refused to hew to our prior precedent, the criminal mail- and wire-fraud statutes mean two different things in this circuit, depending on the context. In the criminal context, they contain no reliance element. E.g., *Daniel,* 329 F.3d at 486. But when Congress incorporates these statutes by reference into a civil cause of action, a reliance requirement magically appears, notwithstanding that in both contexts, *courts are interpreting the same text. I* know of no rule of construction permitting a statute's text to take on such chameleon-like qualities. Tellingly, the majority opinion cites none.

Bender was inconsistent with our precedent interpreting the mail- and wire-fraud statutes when it was decided, and this inconsistency remains today. Yet the majority opinion continues down this errant path, rather than acknowledging the conflict with preexisting circuit precedent. To prevent the error begun in *Bender* and extended today from snowballing any further, we should convene the en banc court to reexamine the whether a civil-RICO claim incorporates the element of reliance. Notably, in a case in which the Supreme Court declined to decide whether a showing of reliance is required, *Anza v. Ideal Steel Supply Corp.,* ___ U.S. ___, 126 S. Ct. 1991, 1998 (2006), the only Justice to address the issue (Justice Thomas) wrote separately to express his conclusion that reliance is not an element of a civil-RICO claim. *Id.* at 2007-08 (2006) (Thomas, J., dissenting in part).[9]

For these reasons, I respectfully dissent.

CONCURRENCE

HAROLD A. ACKERMAN, Senior District Judge, concurring. I substantially agree with Judge Moore's conclusion in her separate opinion that RICO, properly construed, does not require that a plaintiff plead or demonstrate reliance in a civil RICO case based upon the predicate acts of mail or wire fraud. Were I considering this issue as a matter of first impression in the Sixth Circuit, I would join Judge Moore in so holding in this case. However, we do not face a blank slate on this issue in this Circuit. As the majority opinion demonstrates, this Court has consistently held that reliance is required in civil RICO fraud claims such as the claims presented here. We cannot overrule these many prior decisions absent *en banc* review, and no decision of the Supreme Court of the United States compels reversal by this panel. Therefore, while I concur with the majority opinion by Judge Gibbons, I agree with Judge Moore's exhortation that this issue should be reviewed *en banc*.

Reliance is not a required element under the federal mail and wire fraud statutes, 18 U.S.C. § § 1341 and 1343. Furthermore, although RICO requires that a claimant be injured "by reason of a violation," 18 U.S.C. § 1964(c), this causation provision does not necessitate, or even suggest, incorporation of a reliance

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[9] Indeed, one of the judges in the majority appears to agree with this statement of the law. *Prudential Ins. Co. of Am. v. United States Gypsum Co.*, 828 F. Supp. 287, 296 (D.N.J. 1993) ("Specific detrimental reliance is a sufficient but not necessary element of a [civil] RICO cause of action.").

element. The "by reason of" requirement of § 1964(c) "entails an inquiry into whether a defendant's action can be said to have proximately caused the plaintiff's injuries." *Prudential Ins. Co. of Am. v. U.S. Gypsum Co.*, 828 F. Supp. 287,296 (D.N.J. 1993) (Ackerman, J.) "Specific detrimental reliance is a sufficient but not necessary element of a RICO cause of action." Id. Imputation of a reliance element into RICO, where neither the statute nor the predicate statutory crime requires it, runs afoul of the broad purposes of RICO. The Supreme Court, in reviewing "Congress' self-consciously expansive language and overall approach," has instructed that RICO should be "liberally construed to effectuate its remedial purposes." *Sedima, S.P.R.L. v. Imrex, Co.,* 473 U.S. 479,498 (1985) (citations omitted). If not bound by precedent, I would join Judge Moore in rejecting a reliance requirement.

However, as the majority opinion discusses, the Sixth Circuit has expressly and repeatedly held that a plaintiff must show reliance to maintain a civil RICO claim based on mail or wire fraud. *See, e.g., Cent. Distribs. of Beer, Inc. v. Conn, 5* F.3d 181, 184 (6th Cir. 1993) (collecting cases). Most respectfully, Judge Moore's attempts to distinguish these prior cases are unavailing. While I am convinced that these cases misinterpreted RICO, this panel lacks the authority to reverse those decisions unless mandated by a subsequent, contrary decision by the Supreme Court or by *en banc* review by the entire Sixth Circuit. The Supreme Court, in *Neder v. United States,* 527 U.S. 1, 24-25 (1999), restated the longstanding principle that the federal criminal fraud statutes do not require that the Government prove reliance, but *Neder* did not work a change in the low. Long before *Neder, the* federal fraud statutes did not require reliance, and the Sixth Circuit has so recognized. *See, e.g., United States v. Merklinger,* 16 F.3d 670, 678 (6th (25. 1994) (collecting cases). In both published and unpublished opinions issued since *Neder,* this Court has reiterated the reliance requirement. *Yax v.*

UPS, 196 F. App'x 379, 381-82 (6th Cir. 2006) (unpublished opinion); *Chaz Constr., LLC v. Codell,* 137 F. App'x 735, 738-39 (6th Cir. 2005) (unpublished opinion); *VanDenBroeck v. CommonPoint Mortgage Co., 210* F.3d 696, 701 (6th Cir. 2000). In *Yax and Chaz Construction,* different panels of this Court explicitly rejected the argument that *Neder* somehow compels reversal of panel precedent and rejection of the reliance requirement.

As a "visiting fireman" sitting by designation on this Court, Itake seriously my responsibility to apply the law of this Circuit, even if I would read the law differently. I hope that the Sixth Circuit elects, at some point in the future, to consider this issue *en banc* and reaches what I suggest is the proper conclusion that reliance need not be shown in a civil RICO case based on mail or wire fraud.

But this panel alone cannot make such a ruling, and must instead follow established precedent in this Circuit. Because Plaintiffs here failed to plead reliance, and because I concur with the majority opinion's conclusion that dismissal of Plaintiffs' state-law claims was appropriate, I join Judge Gibbons in affirming the district court's judgment in its entirety.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI, and SCOTT WAY, Plaintiffs,	Case No. 04-CV-72316 JUDGE PAUL D. BORMAN UNITED STATES DISTRICT COURT
v.	
CASSENS TRANSPORT COMPANY, CRAWFORD & COMPANY, foreign corporations, and DR. SAUL MARGULES, Defendants.	Filed: July 22, 2005

______________________________/

ORDER DENYING PLAINTIFFS' MOTION FOR LEAVE TO FILE AMENDMENT TO COMPLAINT

Now before the Court is Plaintiffs' Motion for Leave to File Amendment to Complaint, which motion was filed on July 15, 2005. The Court, however, issued an Opinion and Order Granting Defendants' Motion to Dismiss Plaintiffs' Complaint under Rule 12(b)(6) on that same date. Accordingly, the Court DENIES Plaintiffs' motion for leave to amend their complaint.

SO ORDERED.

s/Paul D. Borman
PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

UNITED SATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI, and SCOTT WAY, Plaintiffs,	Case No: 04-CV-72316 JUDGE PAUL D. BORMAN UNITED STATES DISTRICT COURT
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______________________________/

OPINION AND ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS PLAINTIFFS' COMPLAINT UNDER RULE 12(b)(6)

Now before the Court are Defendants' motions to dismiss Plaintiffs' complaint under Federal Rule of Civil Procedure 12(b)(6). The Court heard oral argument on March 10, 2005. Having considered the entire record, and for the reasons that follow, the Court:

1) DISMISSES Plaintiffs' claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § *1961, et*

seq., because they fail to state claims for which relief may be granted, and because Michigan's Workers' Disability Compensation Act, M.C.L. 418.1101, *et seq.*, reverse-preempts those claims under the McCarran-Ferguson Act, 15 U.S.C. § 1012(b); and

2) DISMISSES Plaintiffs' state-law claims of intentional infliction of emotional distress against Defendants for failure to state claims for which relief may be granted.

I. PROCEDURAL BACKGROUND

At all times relevant to the instant action, Paul Brown ("Brown"), William Fanaly ("Fanaly"), Charles Thomas ("Thomas"), Gary Riggs ("Riggs"), Robert Orlikowski ("Orlikowski"), and Scott Way ("Way") (collectively "Plaintiffs") were employees of Cassens Transport Company ("Cassens"). (Compl. at ¶4.) Crawford & Company ("Crawford") adjusted workers-compensation claims of Cassens' employees on Cassens' behalf. (Id.) Dr. Saul Margules ("Margules") examined certain Plaintiffs concerning their entitlements to workers' compensation benefits. *(Id.* at 1613.)

On June 22, 2004, Plaintiffs filed suit against Cassens, Crawford, and Margules (collectively "Defendants"), alleging that each Defendant engaged in a fraudulent enterprise to deny each Plaintiff of his workers' compensation benefits in violation of the Racketeer Influenced and Corrupt Organizations Act ("the RICO Act"), 18 U.S.C. § 1961, *et seq.*, and alleging that Defendants subjected each Plaintiff to the intentional infliction of emotional distress in violation of Michigan law. (Id.

at ¶¶ 1-77.) Plaintiffs' complaint, in essence, alleges that Defendants conspired to deny each Plaintiff's workers' compensation claim even though they were aware of facts that would support the validity of each of those claims.

On August 23, 2004, Crawford filed the instant motion to dismiss Plaintiffs' complaint under Federal Rule of Civil Procedure 12(b)(6). In that motion, Crawford argues that: 1) the McCarran-Ferguson Act, 15 U.S.C. § 1012, *et seq.*, preempts Plaintiffs' RICO claims; and 2) Plaintiffs' intentional-infliction-of-emotional-distress ("IIED") claims fail as a mater of law because Michigan does not recognize causes of action for the mere tortious refusal to pay workers' compensation benefits. (Crawford Mot. at 2.) Cassens and Margules concur in this motion to the extent that its arguments would equally apply to Plaintiffs' claims against them.

On September 7, 2004, Cassens filed the instant motion to dismiss Plaintiffs' complaint under Rule 12(b)(6). Along with raising the same two claims that Crawford raises in its motion to dismiss, Cassens' motion contends that: 1) the primary jurisdiction doctrine bars Plaintiffs' complaint; 2) the Labor Management Relations Act of 1947 ("LMRAC") or § 301(a) 29 U.S.C. § 141 *et seq.*, preempts Plaintiffs' RICO claims; and 3) Plaintiffs' RICO claims fail to state claims for which relief may be granted. (Cassens Mot. at 2-3.) Crawford and Margules concur in this motion to the extent that its arguments would equally apply to Plaintiffs' claims against them.

II. ANALYSIS

Federal Rule of Civil Procedure 12(b)(6) permits a party to raise as a defense to a claim for relief in a pleading the opposing party's failure to state a claim upon which relief can be granted. Rule 12(b)(6) is designed to test whether, as a matter of law, a plaintiff is entitled to legal relief. *Nishiyama v. Dickson County,* 814 F.2d 277, 279 (6th Cir. 1987). Before dismissing a complaint for failure to state a claim upon which relief can be granted, a court must conclude "beyond [a] doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Carver v. Bunch,* 946 F.2d 451, 452 (6th Cir. 1991).

To survive a motion to dismiss under Rule 12(b)(6), a "complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Scheid v. Fanny Farmer Candy Shops, Inc.,* 859 F.2d 434, 436 (6th (15. 1988). When considering a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff and accept well-pleaded facts as true. *Columbia Natural Resources Inc. v. Tatum,* 58 F.3d 1101, 1109 (6th Cir. 1995). Thus, a court may not grant a Rule 12(b)(6) motion based upon its disbelief of a complaint's factual allegations. Id. A court, however, need not accept as true conclusions of law or unwarranted factual inferences. *Morgan v. Church's Fried Chicken,* 829 F.2d 10, 12 (6th Cir. 1987).

Federal Rule of Civil Procedure 9(b) provides that, "[i]n all averments of fraud . . . , the circumstances constituting fraud ... shall be stated with particularity." *See generally Begala v. PNC Bank, Ohio, Nat. Assn,* 214 F.3d 776 (6th Cir. 2000) (holding that pleadings under the RICO Act are to be liberally construed).

Federal Rule of Civil Procedure 12(b) provides:

> If, on a motion asserting the defense. . . [of] failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be towed as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

A. RICO CLAIMS

The Court will proceed to discuss the following issues related to Plaintiffs' RICO claims:

1) whether the primary jurisdiction doctrine mandates a stay of Plaintiffs' RICO claims;

2) whether the *Burford* doctrine mandates a stay of Plaintiffs' RICO claims;

3) whether the complaint pleads predicate acts of witness tampering;

4) whether the complaint pleads predicate acts of mail or wire fraud with the necessary particularity;

5) whether the complaint pleads the requisite detrimental reliance;

6) whether the McCarran-Ferguson Act reverse-preempts Plaintiffs' RICO claims; and

7) whether the Labor Management Relations Act preempts Plaintiffs'

RICO claims,

1. Primary-Jurisdiction Doctrine

In its motion to dismiss, Cassens contends that the doctrine of primary jurisdiction applies to Plaintiffs' RICO claims. (Cassens Br. at 20.) According , to Cassens, all of the Plaintiffs except Fanaly have claims for workers' compensation benefits that are pending before the Workers Disability Compensation Bureau ("the WDCB"). (Reply at 5.)

The primary jurisdiction doctrine's aim is to "promot[e] proper relationships between the courts and administrative agencies charged with particular regulatory duties." *United States v. Western Pac. R. R. Co.*, 352 U.S. 59, 63 (1956). Specifying when the doctrine of primary jurisdiction is applicable, the Supreme Court has held:

> . . . . 'Primary jurisdiction' applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of a claim requires a resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case[,] a judicial process is suspended pending referral of such issues to the administrative body for its views.

Id. at 63-64. Thus, the primary jurisdiction doctrine applies where: 1) be Court has original jurisdiction over the claim before it; 2) the adjudication of that claim requires the resolution of certain underlying issues; and 3) a regulatory scheme commits the resolution of those issues to an administrative agency's special competence. In deciding whether the primary jurisdiction doctrine applies in any given case, the court must determine whether the application of that doctrine in the particular case would serve the following twin rationales underlying that doctrine: 1) uniformity in questions of an administrative nature; and 2) the expert and specialized knowledge of the relevant agency to the issue in question. Id. at 64.

The threshold requirements for the applicability of the primary jurisdiction doctrine are met here. First, the Court clearly has jurisdiction over Plaintiffs' RICO claims as they arise under federal law. Second, the adjudication of Plaintiffs' RICO claims-i.e. that Defendants engaged in a RICO) enterprise fraudulently to deny Plaintiffs' workers' compensation benefits-hinges, in part, upon whether Plaintiffs are entitled to those benefits in the first instance. (Cassens Br. at 20; Resp. Cassens at 17) Lastly, a regulatory scheme of the Michigan legislature, the Workers' Disability Compensation Act ("the WDCA"), commits the resolution of an employee's entitlement to workers' compensation benefits to the special competence of the WDC13. (Cassens Br. at 20.) Specifically, the WDCA, M.C.L. 418.841 (1), provides:

> Any dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau or a workers' compensation magistrate, as applicable.

The primary jurisdiction doctrine's twin rationales are also met here. Given the complicated medical issues underlying Plaintiffs' entitlement to workers' compensation benefits, the WDCB, rather than the Court, possesses the necessary expertise and the specialized knowledge properly to resolve those underlying issues and, thus, the ultimate issues of Plaintiffs' entitlement to benefits. Deferring to the WDCB's determination of a plaintiff's entitlement to workers' compensation benefits in cases such as this would promote uniformity in such determinations. Thus, a consideration of the relevant factors counsels in favor of applying the primary jurisdiction doctrine to stay the adjudication of Plaintiffs' RICO claims, if they survive the instant motion.[14 1]

On the other hand, it is unclear whether the primary jurisdiction doctrine may apply in favor of a state administrative agency where the claim at issue arises under federal law and there are no competing federal forums. 73 C.J.S. Public Administrative Law and Procedure § 72. The majority of courts that have applied the primary jurisdiction doctrine have done so in favor of a federal administrative agency.[152] *See Far East*

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[1] While Cassens contends that the application of the primary jurisdiction doctrine to Plaintiffs' RICO claims would require the dismissal of those claims, such a contention is incorrect. (Cassens Br. at 20-21.) The principal issue underlying the application of that doctrine is simply whether a federal court should postpone the exercise of its jurisdiction in deference to an administrative agency; it does not divest the Court of its subject-matter jurisdiction. *United States v. Philadelphia Nat'l Bank-*, 374 U.S. 321, 353(1963).

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[2] At least one federal court sitting in diversity jurisdiction has applied the primary jurisdiction doctrine in favor of a state administrative agency. *See Northwinds Abatement, Inc. v. Employers Ins. of Wausau,* 69 F.3d 1304, 1311 *(5^0 Cir.* 1995) (holding that, under the doctrine, the district court should have stayed the diversity jurisdiction case pending the state workers' compensation commission's final decision on whether the defendant properly paid certain workers' compensation claims). It is unclear, however,

Conference v. United States, 342 *U.S. 570, 574-75* (1952) (applying the doctrine in favor of the Federal Maritime Board in the context of federal claims); *Western Pac. R. R. Co.*, 352 U.S. at 63-64 (applying the doctrine in favor of the Interstate Commerce Commission in the context of federal claims); *In re Long Distance Telecommunications Litigation,* 831 F.2d 627, 631-32, 634 (6th Cir. 1987) (applying the doctrine in favor of the Federal Communications Commission in the context of federal claims).

In County of Suffolk v. Long Island Lighting Co., the United States Second Circuit Court of Appeals held that, subject to a narrow exception, the primary jurisdiction doctrine does not apply in favor of a state administrative agency where there is a federal claim at issue and where there are no competing federal forums. 907 F.2d 1295, 1310 (2d Cir. 1990) (holding that the exception applies where a state administrative agency operates pursuant to a federal legislative scheme). The Second Circuit chiefly reasoned that the "theoretical underpinning of the primary-jurisdiction doctrine . , . is the authority [that] *Congress* intended th[e] [administrative] agency to exercise within a particular statutory

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whether that federal court deferred to the state administrative agency's primary jurisdiction only on the ground that the *Erie* doctrine would compel such deferral. *See 73 C.J.S.* Public Administrative Law and Procedure § *72; Virginia Imports, Inc. v. Kirin Brewery of Am.*, LLC, 296 F. Supp. 2d 691, 698, 698 n.l (E.D. Va. 2003) (holding that, in a diversity jurisdiction case involving only state claims, the primary jurisdiction doctrine does not apply in favor of a state agency, as compared to a federal agency, and holding that, even if the doctrine were to apply, a federal district court sitting in diversity would defer to a state agency's primary jurisdiction only if state courts would so defer).

scheme." Id. (emphasis in original); *see Far East Conference*, 342 U.S. at 574-75 (addressing the doctrine in terms of a regulatory scheme that Congress created, and noting that courts and administrative agencies are "means adopted to attain the prescribed end ... through co-ordinated action"). The Second Circuit elaborated that, "[i]n the federal question/federal agency context, the creation of an agency and the grant to it of certain adjudicative authority may evince a congressional intent to limit the judiciary's jurisdiction." *County of Suffolk*, 907 F.2d at 1310. As the Court pointed out, "the independent act of a state legislature in creating a particular administrative body. . . can shed no light on *Congress'* intent to limit the jurisdiction of the federal courts[.]" *Id.* at 1311. While finding that the agency-expertise rationale underlying the primary jurisdiction doctrine was implicated in the case, the Court underscored that it is that doctrine's theoretical underpinnings that controls its applicability, "lot the functional competence of an agency[.]" *Id.* at 1310.

However, in the subsequent case of *Johnson v. Nyack Hospital*, the Second Circuit held that, under the primary jurisdiction doctrine, the district court should have stayed the plaintiff's federal antitrust claim pending a state administrative agency's determination of the complicated factual issues underlying that claim. 964 F.2d 116, 122-23 (2d Cir. 1992) (noting that, under the distinct doctrine of exhaustion, the issue is whether Congress' statutory intent was to render a federal claim cognizable only in the first instance by an administrative agency, whether state or federal). While recognizing that most cases applying the primary jurisdiction doctrine did so in favor of a federal administrative agency, the Court reasoned that the application of that doctrine there served the underlying agency-expertise rationale as well as judicial economy. Id The Court neither mentioned nor distinguished *County of Suffolk*. Thus, it is unclear what remains, if anything, of the precedential value of *County of Suffolk*.

As discussed below, the *Burford* doctrine would compel the stay of Plaintiffs' RICO claims pending the WDCB's determination of Plaintiffs' entitlements to workers' compensation benefits.

2. Burford Abstention Doctrine

The *Burford* abstention doctrine takes its name from the Supreme Court's decision in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). In *Rouse v. DaimlerChrysler Corporation, the* United States Court of Appeals for the Sixth Circuit underscored that the aim of the *Burford* doctrine is to "avoid conflict with a state's administration of its own affairs." 300 F.3d 711, 716 (6th Cir. 2002). The Sixth Circuit held that, therefore, the *Burford* doctrine "applies only if a federal court's decision on a state law issue is likely to `interfere with the proceedings or orders of state administrative agencies. "' *Id*. The Sixth Circuit further held:

> The *Burford* abstention [doctrine] should not be applied unless: (1) a case presents difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar, or (2) the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

Id. (internal quotation marks omitted); *see*

Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 727 (1996) (implicitly recognizing that the *Burford* doctrine may apply where the case involves either a "state-law claim" or "an assertion that the federal claims [were] ... entangled in a skein of state law that must be entangled before the federal case can proceed") (internal quotation marks omitted). Since *Burford*, the Supreme Court has held that a federal court may dismiss or remand a complaint "based on abstention principles only where the relief being sought is equitable or otherwise discretionary." *Quackenbush*, 517 U.S. *at* 731 (illustrating such equitable or discretionary relief with suits for injunctive relief or certain classes of declaratory judgments). However, the Court noted that, in actions "at law" or for damages, it has only permitted federal courts, based on abstention principles, to "enter a stay order that *postpones* adjudication of the dispute, not to dismiss the federal suit altogether." Id. at 719.

Cassens contends that the Court should apply the *Burford* doctrine to Plaintiffs' RICO claims so that the WDCB may determine Plaintiffs' entitlement to workers' compensation benefits in the first instance[163] (Cassens Reply at 5.) Plaintiffs, in response, maintain that Cassens has failed to present any meaningful argumentation on the applicability of the *Burford* doctrine to Plaintiffs' RICO claim. (Resp. at 19.) Yet, since the *Burford* doctrine implicates important issues of comity.

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3 While Cassens contends that the application of the *Burford* doctrine to Plaintiffs' RICO claims requires the Court to dismiss those claims, *Quackenbush* forecloses any such contention. (Reply at 5.) Rather, at issue is whether the Court should stay Plaintiffs' RICO claims pending the WDCB's determination of Plaintiffs' entitlement to workers' compensation benefits.

Contrary to Plaintiffs' contention, the determination of their entitlement to workers' compensation benefits in this federal forum would likely frustrate or undermine Michigan's workers' compensation scheme, as set forth in the WDCA. *(See* Resp. Cassens at 19.) That administrative scheme is comprehensive, setting forth the nature and amount of the particular benefits to which it affords entitlement, the scope of any such entitlement, and the administrative and judicial processes for resolving any disputes regarding that entitlement. The determinations of Plaintiffs' entitlement to workers' compensation benefits often hinge upon complex medical issues. Given the expertise and specialized knowledge necessary to resolve such underlying issues properly, the determination of Plaintiffs' entitlement to workers' compensation benefits in this federal forum may result in adjudications that would be contrary to those of the WDCB. Indeed, the frequent resolution, in a federal forum, of a plaintiff s entitlement to workers' compensation benefits in cases such as this would likely undermine the uniformity and coherence in such determinations that Michigan seeks to achieve via its establishment of the WDCB.

Contrary to Plaintiffs' assertion, an employee's entitlement to workers' compensation benefits bears upon "policy problems of a substantial public import" or "matter[s] of substantial public concern." *See Rouse,* 300 F.3d *at 716. (See* Resp. to Cassens at 19.) As the Michigan Supreme Court has declared:

> The primary purpose of the ... [WDCA] is to provide benefits to the victims of work-related injuries by allocating the burden [of] these payments to the employer and,

> therefore, ultimately, to consumers. An employee who suffers an injury arising out of and in the course of his employment will be eligible for compensation regardless of whether the employer was at fault. In return, the employer is immunized from tort liability because the ... [WDCA], under M.C.L. § 415.131(1) . . . , provides that this compensation is the exclusive remedy for a personal injury, except for an injury resulting from intentional tort. Thus, . . .[the WDCA's] purpose is to provide ... not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate.

Simkins v. General Motors Corp., 453 Mich. 703, 710 (Mich. 1996). Thus, an employee's entitlement to workers' compensation benefits bears upon Michigan's significant interest in safeguarding the policy balance that the legislature struck in the WDCA by ensuring employees' speedy and no-fault recovery of guaranteed compensation for work-related injuries and by shielding employers, in exchange for providing their employees with such compensation, from liability beyond that which the WDCA permits. Moreover, both Michigan's employers and their employees have substantial interests in gaining their respective benefits from that regulatory balance. In determining an employee's entitlement to workers' compensation, a federal forum may not be as adept at navigating that policy balance as the VMCB, to which the Michigan Legislature entrusted that task in the first instance. Furthermore, the improper denial of an employee's entitlement to workers' compensation benefits for a work-related disability would be of great public important were that employee, consequently, to become a ward of the state. Comparatively-speaking, in contrast to its substantial interest in resolving the federal-law issues of Plaintiffs' RICO claims, this federal forum would have a minimal interest in determining Plaintiffs' entitlement to workers' compensation benefits. The Court would, therefore, stay Plaintiffs' RICO claims based on their alleged entitlement to workers' compensation benefits, if they survived the instant motions, pending a final determination of Plaintiffs' entitlement to those benefits via Michigan's workers' compensation scheme.

3. RICO Claims

The RICO Act, 18 U.S.C. § 1961, *et seq.*, affords a civil remedy when an individual is "injured in his business or property" by virtue of a violation of § 1962 of the Act. *See* 18 U.S.C. § 1964(c)(providing that the person may "recover threefold the damages [that] he sustains and the cost of the suit, including a reasonable attorney's fee"). Section 1962(c) of the RICO Act provides, in part:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity ...

18 U.S.C. § 1962(c).

The RICO claims that Plaintiffs' complaint sets forth solely arise under § 1962(c). In the instant motions to dismiss, Defendants contend that Plaintiffs' complaint, however, fails to plead claims under § 1962(c) for which relief may be granted.

The elements of a viable cause of action under 18 U.S.C.§ 1962(c) are: 1) the conduct 2) of an enterprise 3) through a pattern 4) of racketeering activity. *Central Distributors of Beer, Inc. v. Conn,* 5 F.3d 181 (6 th Cir. 1993)(quoting *Sedima v. Imrex,* 473 U.S. 479, 496 (1985)). Section 1961(1)(B) of the RICO Act defines the requisite "racketeering activity" to include, as a predicate act, "any act which is indictable under any of the following provisions of title 18, United States Code ... section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), . . . [and] section 1512 (relating to tampering with a witness, victim, or an informant)[.]" 18 U.S.C. § 1961(1)(B). Section 1961(5) of the RICO Act mandates that the requisite "pattern of racketeering activity" include at least two acts of such activity, which must have occurred within a ten-year period. 18 U.S.C. § 1961(5).

a. Witness Tampering

Cassens, for the first time in reply, asserts that Plaintiffs' complaint fails sufficiently to plead a predicate act of witness tampering under 18 U.S.C. § 1512. (Reply at 4.) Plaintiffs' complaint, per paragraphs 12, 16A, 32, and 34A, alleges that each Defendant twice violated § 1512 when, on two occasions, the corporate Defendants "expressly or implied[ly] communicated to" Margules that they wanted him to write false cut-off reports for Plaintiffs Fanaly and Brown regardless of their actual entitlement to workers' compensation benefits and when Margules opined to the other Defendants that Plaintiffs had no job-related disabilities. (Compl. at ¶¶ 12, 16A, 32, 34A.)

These allegations, however, are insufficient to survive a motion to dismiss. Plaintiffs' complaint fails to explain how Defendants' actions violated § 1512. Indeed, Plaintiffs acknowledged the tenuous and specious nature of such predicate acts at oral argument. Accordingly, the Court dismisses Plaintiffs' RICO claims to the extent that they rely upon predicate acts under 18 U.S.C. § 1512.

b. Mail and/or Wire Fraud

A plaintiff must prove each element of the predicate act or "racketeering activity" for a civil action under the RICO Act to lie. *Central Distributors of Beer, Inc. v. Conn,* 5 F.3d 181, 183-84 (6hCir. 1993). "To allege a violation of the mail fraud statute, it is necessary to show that: 1) the defendants formed a scheme or artifice to defraud; 2) the defendants used the United States mails or caused a use of the United States mails in furtherance of the scheme; and 3) the defendants did so with the specific intent to deceive or to defraud." M. at 184 (citing *Schreiber Distributing v. Serv-well Furniture,* 806 F.2d 1393, 1399 (9th Cir. 1988)). Similarly, to allege a violation of the wire fraud statute, it is necessary to show: 1) "the formation of a scheme or artifice to defraud; 2) use of the United States wires or causing a use of the United States wires in furtherance of the scheme; and 3) [the] specific intent to deceive or to defraud." Id. (citing *Schreiber, 806* F. 2d at 1400).

Federal Rule of Civil Procedure 9(b) states:

> In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Where a plaintiff relies upon mail or wire fraud to constitute a predicate act under RICO, Rule 9(b) requires that he must allege, at a minimum, the time, place, and contents of the fraudulent communications. *Bender v. Southland Corp.*, 749 F.2d 1205, 1216 (6th Cir.. 1984).

(1) Requisite Particularity

In its motion to dismiss, Cassens contends that Plaintiffs' complaint fails, as a matter of law, to plead the predicate acts of wire or mail fraud underlying their RICO claims with the particularity that Rule 9(b) requires. (Cassens Br. at 16.) In particular, Cassens asserts that Plaintiffs' complaint fails to plead with particularity the time, place, or content of the communications underlying the alleged predicate acts of mail or wire fraud. (Cassens Br. at 17.) Plaintiffs, in response, assert that their complaint pleads the mail and wire communications with the necessary particularity. (Resp. Cassens at 10).

As to Plaintiff Fanaly's RICO claims, the complaint pleads with the requisite particularity two predicate acts of mail fraud, per paragraphs 9 and 14, and one predicate act of wire fraud, per paragraph S. Paragraphs 12 and 16A plead additional claims of mail and wire fraud in that they allege, respectively, that "Defendants expressly or implied[ly] communicated to" Margules that they wanted him to write false cut-off reports regardless of the true circumstances, and that "Margules opined to the other [D]efendants that [P]laintiff had no job-related disability." (Compl. at ¶¶ 12, 16A.) Paragraphs 12 and 16A further plead that these communications were "by mail and wire and are not in the possession of [P]laintiff but are in the possession of [D]efendants," and that these allegations are "based in part upon information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery." (*Id.*) Paragraphs 12 and 16A fail to plead the time and place of such communications.

Plaintiffs contend that, where, as here, their complaint expressly invokes Federal Rule of Civil Procedure 11 (b)(3), which allows pleading based on "evidence reasonably anticipated after further investigation or discovery," the Court should relax the particularity-requirement of Rule 9(b). (Resp. Cassens at 11.) In *Rotella v. Wood,* the Supreme Court affirmed that Rule 11 (b)(3) provides some "flexibility" concerning Rule 9(b)'s particularity requirement. 528 U.S. 549, 560 (2000) (citing *Corley v. Rosewood Care Center, Inc. of Peoria,* 142 V.3d 1041, 1050-51 *(7th* Cir. 1998), in which the court relaxed Rule 9(b)'s particularity requirements where the RICO plaintiff lacked access to all facts necessary to detail his claim). On the other hand, while Rule 11(b)(3) may relax Rule 9(b)s particularity requirement; it cannot be construed to eviscreate that requirement in its entirety by permitting rank speculation. The Court strikes from the complaint the predicate acts alleged in paragraphs 12 and 16A. However, Fanaly's RICO claims, per paragraphs 8, 9, and 14, plead with the requisite particularity at least two predicates acts of mail and/or wire fraud.[174]

As to Plaintiff Thomas' RICO claims, the complaint pleads with the necessary particularity only one predicate act, mail fraud per paragraph 23. However, paragraph 24 fails properly to plead

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4 Nevertheless, Fanaly's RICO claims based upon the predicate acts in paragraphs 8, 9, and 14-along with the predicate act in paragraph 12-fail to state claims for which relief may be granted, as discussed below.

another predicate act. Rather, paragraph 24 simply alleges that "Defendants also committed mail fraud in that their pleadings in the workers' compensation case fraudulently denied that [P]laintiff suffered a work-related injury when they had knowledge that [P]laintiff had suffered" such an injury. (Compl. at ¶ 24.) Paragraph 24, which neither invokes Rule 11(b)(3) nor would have any reason to do so, fails to allege with the necessary particularity the time or the place of that communication. Because Thomas' RICO claims only sufficiently plead one predicate act, they fail, as ea matter of law, to allege the requisite "pattern of racketeering activity" and, thus, to plead RICO claims for which relief can be granted.[185] *See* 18 U.S.C. § 1961(5).

As to Plaintiff Brown's RICO claims, the complaint pleads with the necessary particularity three predicate acts of mail fraud, per paragraphs 35 and 41A, and three predicate acts of wire fraud, per paragraphs 41 and 41A. Paragraphs 32 and 34 allege, respectively, that Defendants "expressly or implied[ly] communicated" to Margules via mail and wire that they wanted him to write false cut-off reports, and that Margules opined to Defendants via mail and wire that Brown had no job-related disability; both paragraphs expressly invoke Rule I I (b)(3). For the same reasons stated above, the Court finds that paragraphs 32 and 34 do not plead predicate acts of mail and wire fraud with the requisite particularity to survive the instant motions to dismiss. However, Brown's RICO claims, per paragraphs 35, 41, and 41A, plead with the requisite particularity at least two predicate acts of mail

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5 Moreover, even if paragraph 24 alleges a predicate act of mail fraud with the necessary particularity, Thomas' RICO claims would still fail to state claims for which relief may be granted band upon the predicate act in paragraph 23, as addressed below.

and/or wire fraud.[196]

As to Plaintiff Riggs' RICO claims, the complaint pleads only one predicate act mail fraud per paragraph 48-although it does so with the requisite particularity.[207] Because Riggs' RICO claims fail to plead at least two predicate acts, they fail, as a matter of law, to allege the requisite "pattern of racketeering activity" and, thus, to plead RICO claims for which relief can be granted.[218] *See* 18 *U.S.C.* § 1961(5).

As to Plaintiff Orlikowski's RICO claims, the complaint pleads a predicate act of mail fraud, per paragraph 58, with the requisite particularity. Paragraph 57 pleads another predicate act of mail and/or wire fraud based upon Margules' transmission of his allegedly-fraudulent medical report to Defendants. VA-dle paragraph 57, which does not invoke Rule 11(b)(3), pleads the time and content of the communication, it fails to specify the means of the communication. Even if paragraph 57 were to plead a predicate act of mail or wire fraud with the requisite particularity, Orlikowski's RICO

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6 In any event, as discussed below, Brown's RICO claims based upon the predicate acts in paragraphs 35, 41, and 41A-along with those in paragraphs 32 and 34-fail to state claims for which relief may be granted.

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7 Moreover, as discussed below, Riggs' RICO claims based upon the predicate act in paragraph 48 would fail to state claims for which relief may be granted for another reason.

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8 Moreover, Riggs' RICO claims based upon the predicate act of mail fraud in paragraph 48 fail to state claims for which relief may be granted for another reason, as addressed below,.

claims based upon such a predicate act-along with the predicate act in paragraph 58-would, nevertheless, fail as a matter of law, as discussed below.

Lastly, as to Plaintiff Way's RICO claims, the complaint pleads with the necessary particularity at least two predicate acts of mail fraud, per paragraphs 68 and 69.[229]

The Court, therefore, dismisses the RICO claims of Plaintiffs Thomas and Riggs for failure to plead the requisite "pattern of racketeering activity" and, thus, to plead RICO claims for which relief can be granted. *See* 18 U.S.C. § 1961(5).

c. Detrimental Reliance

In its motion to dismiss, Cassens contends that Plaintiffs must either plead detrimental reliance as an element of each predicate act of mail or wire fraud underlying their RICO claims or as part of the causation element of those claims, and that Plaintiffs' complaint has failed to do so. (Cassens Br. at 17, 19; Reply at 4.) Plaintiffs, in response, assert otherwise. (Resp. at 15).

In *Blount Financial Services, Inc. v. Walter E. Heller & Co., 819* F.2d 151, 152-53 (6th Cir. 1987), the United States Court of Appeals for the Sixth Circuit held that a civil RICO complaint involving a predicate act of mail fraud must allege "with particularity the false statement of fact made by the defendant which the plaintiff relied on and the facts

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9 However, Way's RICO claims based upon the predicate acts in paragraphs 68 and 69 fail to state claims for which relief may be granted, as discussed below.

showing the plaintiffs reliance on defendant's false statement of fact" to establish the "scheme to defraud" element of mail fraud. *Accord Bender, 749* F.2d at 1216; *Central Distributors, 5* F.3d at 184. The Sixth Circuit continues to espouse this holding.[2310]

While a plaintiff need not plead detrimental reliance as an element of each predicate act of or wire fraud underlying his RICO claims, the Sixth Circuit, in *Chaz Construction, L.L.C. v. Codell,* recently opined that *"Central Distributors [v. Conn.,* 5 F.3d 181, 184 (6th Cir. 1993),] held that a showing of reliance is required to establish standing in civil RICO cases" and that this "holding ... is not in conflict with the Supreme Court's decision in *Neder [v. United States,* 527 U.S. I (1999),] or th[e] ... [Sixth Circuit's] decision in *[United States v.] Daniel,* [329 F.3d 480 (6th Cir. 2003)]." No. 04-5200,2005 WL

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10 See VanDenBroeck v. Commonpoint Mortgage Co ,210 F.3d 696,701(6th Cir. 2000) (holding, in a civil RICO case based upon predicate acts of mail and wire fraud, that the plaintiff must plead "a material misrepresentation of fact that was calculated or intended to deceive persons of reasonable prudence, and comprehension," and that the plaintiff "relied upon that material misrepresentation" to establish the fraud statutes' requisite "scheme to defraud"); *Armbruster v. K-H Corporation, 206* F. Supp. 2d 870, 898 (E.D. Mich. 2002) (relying upon *Blount,* 819 F.2d at 152, and *Bender,* 749 F2d at 1215, to hold that a civil RICO complaint based upon predicate acts of mail fraud must plead the plaintiff's reliance upon the defendant's misrepresentation); *Paycom Billing Services, Inc. v. Payment Resources Intl,* 212 F. Supp. 2d 732, 736 (W.D. Mich. 2002) (relying upon *VandenBroeck, 210* F.3d at 701, to hold that a civil RICO complaint based upon predicate acts of mail fraud must plead the plaintiff's reliance upon the defendant's material misrepresentation).

(6th Cir. May 11, 2005) (unpublished opinion). In *Chaz Construction*, the Sixth Circuit recognized that, per *Neder*, the common-law requirement of justifiable reliance has no place in the federal fraud statutes-to wit, that reliance is not an element of mail or wire fraud. Id. Underscoring that criminal prosecutions, unlike civil actions, under RICO do not require standing, *Chaz Construction* reasoned that, "[t]herefore, the holding in *Central Distributors* that plaintiffs must plead reliance in order to establish standing in a civil RICO case does not conflict with the holdings in *Neder and Daniel.......... "Id.*

Plaintiffs assert that their complaint sufficiently pleads that Plaintiffs detrimentally relied upon the allegedly fraudulent communications underlying the alleged predicate acts, if such detrimental reliance were required. (Resp. Cassens at 17.) Specifically, Plaintiffs' complaint asserts that they relied upon such communications by "suffer[ing] the financial loss of having to pay attorney fees, medical care, and medical mileage." (Compl. at ¶¶ 17, 25, 38, 42, 50, 61, 70.)

As Defendants aptly note, Plaintiffs argue, in essence, that they relied upon the alleged fraudulent communications by challenging and disclaiming the truthfulness or validity of the content of those communications, rather than by assuming the truthfulness or validity of such content and by taking actions based upon that assumption to their detriment. (Cassens Br. at 19.) Yet, the plaintiff must detrimentally rely upon the alleged fraudulent communications by virtue of being "deceived by" them. *See Grantham and Mann, Inc. v. American Safety Products., Inc.*, 831 F.2d 596, 606 (6 th Cir. 1987). Here, most of the predicate acts of mail and/or wire fraud in Plaintiffs' complaint surround Notices of Dispute or other communications to Plaintiffs setting forth the reason for Defendants' denial of Plaintiffs' workers' compensation benefits, per paragraphs 8, 9, 14, 23, 35, 48, 58, 69, or communications to a particular Plaintiff regarding Defendants' refusal to pay Plaintiffs medical bills pending a workers' compensation appeal or Defendants' assertion that they mistakenly believed that they were not obligated to do so, per paragraph 41 and 41A. However, instead of detrimentally relying upon those communications by virtue of being deceived by their content, Plaintiffs, as their complaint acknowledges, challenged the validity of that content in the first instance. Thus, Plaintiffs' injury arose, not from their reliance upon such fraudulent communications, but, rather, from Defendants' denial of Plaintiffs' workers' compensation benefits. *See Grantham*, 831 F.2d at 606. Moreover, a plaintiff cannot detrimentally rely upon any alleged fraudulent communications that were not directed to him. *Cf. Central Distributors of Beer, Inc. v. Conn*, 5 F.3d 18 1 (6th Cir. 1993). Here, paragraphs 12, 16A, 32, 34, 41, 57, and 68 allege fraudulent communications by Defendants that were not directed at any Plaintiff.

Thus, by failing to plead the key requirement of detrimental reliance, Plaintiffs' RICO claims based upon the predicate acts in paragraphs 8, 9, 12, 14, 23, 32, 34, 35, 41, 41A, 57, 58, 68, and 69 fail to state claims for which relief may be granted. Because Fanaly's RICO claims, which are based upon predicate acts in paragraphs 8, 9, 12, 14, and 16A, fail to plead at least two predicate acts upon which such claims may be granted, they necessarily fail to plead the requisite "pattern of racketeering activity." *See 18* U.S.C. *§* 1961(5). Since Brown's RICO claims, which are based upon predicate acts in paragraphs 32, 34, 35, 41, and 41A, fail to plead at least two predicate acts upon which such claims may be granted, they fail to plead the necessary "pattern of racketeering activity" as a matter of law. Because Orlikowski's RICO claims, which are based upon predicate acts in paragraphs 57 and 58, fail to plead at least two predicate acts upon which such claims may be granted, they necessarily fail to plead the requisite "pattern of racketeering activity." Lastly, since Way's RICO claims, which are based upon predicate acts in paragraphs 68 and 6% fail to plead at least two predicate acts upon which such claims may be granted, they &H, as a matter of law to plead the necessary "pattern of racketeering activity." In sum, Plaintiffs' RICO claims fail to state claims for which relief may be granted. The Court, therefore, dismisses all of the Plaintiffs' RICO claims.

4. McCarran-Ferguson Preemption

Crawford argues that, under the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), the WDCA, M.C.L. 418.110 1, *et seq.*, reverse-preempts Plaintiffs' RICO claims, which allege that each Defendant engaged in a fraudulent enterprise to deny each Plaintiff of his workers' compensation benefits. (Crawford Br. at 2.) Plaintiffs, in turn, maintain that the McCarran-Ferguson Act does not preempt their RICO claims.

The McCarran-Ferguson Act, 15 U.S.C. § 1012(b), provides:

> No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such acts specifically relate to the business of insurance.

The McCarran-Ferguson Act's aim is to establish "a form of inverse preemption, letting state law prevail over general federal rules-those that do not `specifically relate to the business of insurance.'" *Nationwide Mutual Ins. Co. v. Cisneros,* 52 F.3d 1351, 1360 (6th Cir. 1995) (internal quotation marks omitted). However, under the Act, "when Congress enacts a law specifically relating to the business of insurance, that law controls." *Humana Inc. v. Forsyth,* 525 U.S. 299, 306 (1999). To recap, the McCarran-Ferguson Act precludes the application of a federal statute: 1) that does not "specifically relate to the business of insurance"; 2) in the face of state law "enacted ... for the purpose of regulating the business of insurance"; and 3) where the federal statute would "invalidate, impair, or supersede" the state insurance law. Id. at 307.

As to the first prerequisite, the RICO Act is not a federal statute that "specifically relate[s] to the business of insurance." *Humana,* 525 U.S. at 307. Thus, the first prerequisite to reverse-preemption under the Act is met here.

As to the second prerequisite, a state law is "enacted . . . for the purpose of regulating the business of insurance" where: 1) it has the "effect of transferring or spreading the policyholder's risk"; 2) it is an "integral part of [do] policy relationships between [the] insurer and [the] insured"; and 3) it is "limited to entities within the insurance industry." *Medical Mut. of Ohio v. DeSoto,* 245 F.3d 561, 574 (6th Cir. 2001). The Court recognizes that whether Michigan enacted the WDCA "for the purpose of regulating the business of insurance" is, indeed, a thorny issue, The Court concludes, however, that the WDCA does, in fact, regulate the business of insurance.

First, the Court finds that the WDCA transfers or spreads a risk that is characteristic of insurance. *See Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119 (1982). As the Michigan Supreme Court has opined, "[t]he primary purpose of the ... [WDCA] is to provide benefits to the victims of work-related injuries by allocating the burden [of] these payments to the employer and, therefore, ultimately, to consumers." *Simkins, 453 NEN at 710.*

Second, the Court finds that the WDCA is an "integral part of [the] policy relationships between [the] insurer and [the] insured." *DeSoto, 245 F.3d* at 574. The WDCA requires all Michigan employers to provide workers' compensation benefits to their employees, either by self-insuring or by purchasing insurance from a duly-authorized insurance company. If one were to define the employee as the insured and the self-insured employer as the insurer, then the, WDCA would, indeed, be an integral part of the policy relationship between the employee and employer, so defined. If one were to define the non-self-insured employer and the employer's insurer or the employee and the employer's insurer as the insured and insurer, respectively, then the WDCA would still be an integral part of the policy relationship between those entities and individuals in that the employer and its insurer have, in essence, contractually agreed to have the insurer fulfill the employer's obligations to its employees under the WDCA.

Lastly, the Court concludes that the WDCA is "limited to entities within the insurance industry." Plaintiffs, in essence, maintain that the WDCA is not limited to such entities because it reaches self-insured employers and claims' adjusters, like Cassens and Crawford, respectively, and is not limited to insurance companies. (Resp. to Crawford at 1; Resp. to Cassens at 6.) However, as Crawford points out, adjusters of insurance claims are entities within the insurance industry. *See Pireno,* *458* U.S. at 134 n.8. By electing to self-insure its obligation to provide workers' compensation benefits to its employees, pursuant to the WDCA's strict requirements, the employer, in effect, stands in the stead of an insurance company. The WDCA does not include entities outside of the insurance industry simply because it reaches employees, whom one could characterize as either the insured or the beneficiaries of the insurance. Similarly, the WDCA does not include entities outside of the insurance industry simply because it reaches employers who elect to purchase insurance from an insurance company rather than to self-insure, which employers one could, then, characterize as the insured.

The Court notes that the Michigan Legislature did not expressly associate the WDCA with the regulation of insurance. *See Biondo v. Life Ins. Co. of North Am.*, 116 F.Supp.2d 872, 883 (E.D. Mich. 2000). Rather, as Plaintiffs aptly note, Michigan Complied Laws place the WDCA in Chapter 418 dealing with labor rather than in Chapter 500 in the Insurance Code, and the Michigan's Department of Consumer and Industry Services, rather than the Michigan Insurance Bureau, regulates and has jurisdiction over the WDCA's administrative scheme. (Resp. to Crawford at 2-3; Supplemental Br. at 2.) However, the Court finds that this consideration, while relevant, is insufficient in itself to compel a finding that the WDCA does not regulate the business of insurance. Similarly, Plaintiffs' attempt to characterize the provision of workers' compensation benefits as not comprising insurance is unpersuasive. (Resp. to Crawford at 1.) Rather, the term "insurance" denotes "[a] contract whereby, for a stipulated consideration, one party undertakes to compensate the other for loss on a specified subject by specified perils." Black's Law Dictionary 802 (6th

Ed. 1990). The WDCA simply deprives the parties of their freedom of contract and, instead, imposes the benefits and burdens of the predetermined bargain upon them. The scope of that bargain-to "compensate ... for the loss on a specified subject by specified perils" or to compensate for work-related injuries here-remains unchanged.

As to the last prerequisite, the Court concludes that the RICO Act would impair the WDCA here. As the Supreme Court held in *Humana Inc. v. Forsyth*, when the federal statute does not "directly conflict" with the state law and "when application of the federal law would not frustrate any declared state policy or interfere with a [s]tate's administrative regime:" the federal law does not "invalidate, impair, or supersede" the sow law. 525 U.S. at 310. According to the Supreme Court, the term "invalidate" denotes 'to render ineffective, generally without providing a replacement rule or law," and the term "supersede" denotes "to displace (and thus render ineffective) while providing a substitute rule." Id. at 308 (internal quotation marks omitted) (finding that the RICO Act would neither invalidate nor supersede Nevada insurance-fraud law).

The RICO Act and the WDCA do not directly conflict. Rather, one could comply with both the RICO Act and the WDCA. Moreover, the termination of workers' compensation benefits to which the employee is entitled would be actionable under the WDCA and, where part of a fraudulent RICO enterprise, would be actionable under the RICO Act as well. In otherwords, the RICO Act would not proscribe conduct-i.e. the termination of workers' compensation benefits to which the employee is entitled-that the WDCA would permit or prescribe. Consequently, the application of the RICO Act in this case would neither "render ineffective " nor "displace" the WDCA or any claim under that Act. Thus, applying the RICO Act here would neither invalidate nor supersede the WDCA.

Rather, at issue is whether applying the RICO Act to this case would "impair" the WDCA. The Supreme Court held that the term 'Impair"denotes "[t]o weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner." *Humana,* 525 U.S. at 309-10 (internal quotation marks omitted). Moreover, as the Court noted, a federal law "impairs" a state law where it "frustate[s] any declared state policy or interfere[s] with a [s]tate's administrative regime." *Id.* at 310.

Analyzing *Humana* for the first time in reply, Crawford asserts that the application of the RICO Act in the instant case would "impair" the WDCA because the RICO Act, in affording treble damages and a private right of action, provides Plaintiffs greater recourse than that which the WDCA provides. (Crawford Reply at 2-3, Br. at 5; *See* Cassens Br. at 16.) In *Humana, the* Supreme Court addressed the issue of whether the RICO Act impairs Nevada insurance-law by providing materially-different remedies than that state law for purposes of the McCarran-Ferguson Act. 525 U.S.. at 305 The court held that, although the RICO Act authorizes treble damages while Nevada's insurance-fraud law permits recovery of only compensatory and punitive damages, applying the RICO Act in that case would not impair the state law but, rather, would complement its remedial scheme. Id. at 313. Specifically, the Court noted that, based upon Nevada law's bad-faith exception to its punitive-damages cap, a plaintiff may be eligible under state law for damages exceeding those under the RICO Act. Id. at 313.

Here, Plaintiffs would not be eligible to receive damages equal to or exceeding those available under the RICO Act by virtue of an exception to the exclusive remedies that the WDCA provides. ,*See* M.C.L.A.418.131- As discussed below, Plaintiffs' claims of intentional infliction of emotional distress surrounding Defendants' alleged fraudulent denial of Plaintiffs' workers' compensation benefits under Michigan law fail to state claims for which relief may be granted.

As the Court previously noted, the purpose of the WDCA "is to provide . . . not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate." *Simkins*, 453 Mich. at 710. Thus, applying the RICO Act here to Plaintiffs' claims that Defendants fraudulently denied Plaintiffs' workers' compensation benefits so as to render Plaintiffs eligible for damages beyond those which the WDCA permits would turn on its head the policy balance that the Michigan legislature stuck in the WDCA. Indeed, employees would still receive the speedy and no-fault recovery of guaranteed compensation for work-related injuries under the WDCA, thereby reaping their respective benefits from that legislative balance. However, imposing liability under the RICO Act upon employers beyond that which the WDCA permits robs those employers of the benefits that they are to receive from the WDCA's policy balance.[2411] To impose liability under the RICO Act upon

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[11] Plaintiffs argue that applying the RICO Act would encourage employers to pay valid claims rather than to deny them fraudulently and, thus, would promote the WDCA's aim of ensuring employees' quick recovery of benefits. (Resp. at 4.) However, this argument ignores the other half of the bargain that the WDCA struck.

employers' insurers of workers' compensation benefits or the claims' adjusters of those insurers, rather than the employers themselves, would still undermine the WDCA's policy balance in that any such liability would ultimately be passed on to the employers in the form of higher premiums. Thus, the Court concludes that the WDCA reverse-preempts Plaintiffs' RICO claims pursuant to the McCarran-Ferguson Act, 15 U.S.C. § 1012(b). The Court, therefore, DISMISSES Plaintiffs' RICO claims on this alternate ground.

5. LMRA Preemption

The Labor Management Relations Act of 1947 ("LMRA") or § 301(a), 29 U.S.C. § 141 *et seq.*, governs the interpretation of collective bargaining agreements ("CBAs"). Section 301, which provides a federal cause of action for a breach of a CBA, states in part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce ... may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a). "[S]ection 301 not only confers federal jurisdiction over controversies involving ... [CBAs], but also authorizes the federal courts to fashion a body of federal law for the enforcement of section 301." *Terwilliger v. Greyhound Lines, Inc.*, 882 F.2d 1033, 1036 (6th Cir. 1989). Moreover, to develop a uniform body of national labor law and "to avoid conflicts in the interpretation of collective bargaining agreements," the federal law governing

§ 301 preempts state law. Id. Pursuant to this preemption doctrine, § 301 governs claims that directly rely upon rights that arise from CBAs and claims that substantially hinge upon the analysis or interpretation of collective bargaining agreements. Id.

"[F]ederal labor policy requires that individual employees wishing to assert [labor] contract grievances must *attempt* use of the contact grievance procedure agreed upon by the employer and the union as the mode of redress." Lot at 1039 (internal quotation marks omitted; emphasis in the original). Additionally, unless the employee utilizes the contractual procedures for settling his labor-contract dispute, his independent suit in district court based upon that dispute must be dismissed, Id. (internal quotation marks omitted).

Relying upon exhibits attached to its pleadings, Cassens, in its motion to dismiss, maintains that § 301 of the LMRA preempts Plaintiffs' RICO claims. (Mot. at 2-3.) Cassens asserts that Plaintiffs, as union members, were subject to CBAs entitled National Master Automobile Transporters Agreement ("National CBA") and Central-Southern Area Supplemental Agreement ("Supplemental CBA"). (Br. at 1; Molter Aff., Ex. 1.) As Cassens notes, Article 41 of the National CBA provides:

> Physical, mental or other examinations required by ... the Employer shall be promptly complied with by all employees.
>
> Examinations are . . . not to exceed one (1) in any one (1) year, except in emergencies or proven necessity.

> The Employer reserves the right to select its own medical examiner or physician, and the Union may, if it believes an injustice has been done an employee, have said employee reexamined at the Union's expense. If the two (2) doctors disagree, the Employer and the Union shall mutually agree upon a third (3rd) doctor whose decision shall be final and binding on both parties. The selection of the third (3rd) doctor shall be made within seven (7) days. The expense of the third (3rd) doctor shall be equally divided between the Employer and the Union.
>
> In those states where Workers' Compensation statutes or regulations do not permit an injured employee to select his/her own treating physician, the Employer shall provide a list or panel of no less than three (3) Board-certified physicians from which the employee may choose, unless prevented by state law.
>
> Employees are required to go to the doctor selected by the Employer.

(Art. 41, Ex. B) Cassens maintains that § 301 of the LMRA preempts Plaintiffs' RICO claims because they do not seek to vindicate a substantive right from a source other than Article 41 of the National CBA.[2512] *(Id.* at 11)

As an initial matter, "[t]he use of the term

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12 See e.g. Chicago District Council of Carpenters Pension Fund v. Ceiling Wall Sys., Inc., 915 F. Supp. 939 (N.D. Ill. 1996).

`preemption' in this setting ... has a dissonant ring to it." *Trollinger v. Tyson foods, Inc.*, 370 F. 3d 602, 608, 611 (6th Cir. 2004). Making such an observation, the United States Sixth Circuit Court of Appeals opined:

> To say that federal courts ... [may not] hear a claim under one federal act (RICO) because it is `preempted' by another federal act ... is not a natural use of the term `preemption.' As federal courts generally use the term, preemption does not describe the effect of one federal law upon another; it refers to the supremacy of federal law over state law when Congress, acting within its enumerated powers, intends one to displace the other.

Trollinger v. Tyson Foods, Inc., 370 F.3d 602, 608, 611 (6th Cir. 2004) (internal quotation marks omitted). The Court further observed that a "cardinal principal of statutory construction" is that, "[w]hen there are two [federal] acts upon the same subject, the rule is to give effect to both." *Id.* (internal quotation marks omitted). According to the Court, "[a]bsent an intolerable conflict between the two statutes," courts are unwilling to construe the subsequent federal act as repealing any portion of the former federal act. Id. (internal quotation marks omitted).

In any event, Cassens relies upon materials that transcend the pleadings to support its contention that § 301 of the LMRA preempts Plaintiffs' RICO claims. Having already concluded that Plaintiffs' RICO claims fail as a matter of *law*, the Court declines, in its discretion, to treat the instant motion to dismiss under that rule as a motion for summary judgment pursuant to Rule 56 for purposes of adjudicating Cassens' contention that § 301 preemption affords another ground for summary dismissal of Plaintiffs' RICO claims.

B. IIED CLAIMS

Plaintiffs' complaint, per Count VII, alleges that Defendants subjected each Plaintiff to the intentional infliction of emotional distress ("IIED") in violation of Michigan law. In particular, Plaintiffs' complaint provides:

> Cassens ... and Crawford ... engaged in a `continuous pattern of harassment, abuse, and unethical conduct,' as that phrase was used in *Hailes v. Liberty Mutual Ins. Co.*.., and also fraudulent conduct, intentionally inflicting emotional distress on plaintiffs and on other Cassens['] employees.... This conduct includes the acts alleged by each [P]laintiff in their complaints ....

(Compl. at ¶¶ 75-77.)

Having dismissed all claims over which the Court has original jurisdiction under Rule 12(b)(6) for failure to state claims for which relief may be granted,[2613] the Court would normally decline to exercise pendent jurisdiction, under 28 U.S.C. § 1367, over Plaintiffs' RED claims. *See Hankins v. The Gap, Inc.*, 84 F.3d 797 (6th Cir. 1996). However, because the resolution of Plaintiffs' IIED claims is

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[13] While Plaintiffs' complaint cursorily alleges that the Court has subject-matter jurisdiction under 28 U.S.C. § 1332, it fails, by virtue of Defendant Margules, to establish the complete diversity of citizenship that § 1332 requires. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 580 rL2 (1999).

necessary to the Court's determination of whether the WDCA reverse-preempts Plaintiffs' RICO claims under the McCarran-Ferguson Act, as addressed above, the Court will exercise pendent jurisdiction over Plaintiffs' RED claims.

Crawford maintains that Plaintiffs' IIED claims fail to state claims for which relief may be granted. (Crawford Mot. at 2; Cassens Mot. at 22.) While the Michigan Supreme court has yet to recognize formally the tort of IIED, it has described the elements that would be necessary to establish those claims. *Roberts v. Auto Owners Ins. Co.*, 422 Mich. 594, 697, 603 (Mich. 1985). Specifically, a plaintiff would have to demonstrate: 1) extreme and outrageous conduct; 2) intent or recklessness; 3) causation; and 4) severe emotional distress. *Roberts,* 422 Mich. at 602. As to the requisite extreme and outrageous conduct, the Court has adopted the following standards that Restatement, Torts, 2d § 46, Commend D, sets forth:

> ... [T]he conduct ... [must be] so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arose his resentment against the actor, leaving him to exclaim, 'outageous.'

Id. at 603.

Plaintiffs, in response, contend that their IIED claims rest upon Defendants' alleged fraudulent denial of Plaintiffs' workers' compensation benefits. (Resp. to Crawford at 6.) Plaintiffs further contend that, under *Broadus v. Ferndale Fastener Div.*, 84 Mich. App. 593 (1978) and *Atkinson v. Farley*, 171 Mich. App. 784 (1988), their IIED claims state claims for which relief may be granted. (Id.) *In Atkinson*, the Michigan Court of Appeals held that "[a]n insurer's wrongful, bad faith termination of benefits, by itself, is not sufficiently outrageous to support a claim for intentional infliction of emotional distress." 171 Mich. App. at 790. The Court held, however, that the plaintiff's complaint alleged an IIED claim for which relief could be granted because it alleged the following:

> . . . [Defendants were in a position of control over [the] plaintiff's sole source of income, and knew that [the] plaintiff was extremely dependent upon the receipt of his [workers' compensation] disability benefits, yet-abused their position by interfering with plaintiff's benefits, by ignoring the requirement to deal with his attorney, by threatening to cut off ... [his] benefits, and by demanding that ... [he] repay them a large sum of money.... [D]efendants were abusing their control of [the] plaintiff's income ... to harass and intimidate him to gain economic benefit for the insurance company.

Id. at *791*. In *Broadus*, the Michigan Court of Appeals held that the WDCA's exclusive-remedy provision does not bar an action for the intentional infliction of emotional distress surrounding the defendants' alleged collusion in denying workers' compensation benefits where the essence of the tort and the damage alleged is non-physical, such as emotional and mental distress damages. 84 Mich. App. at 597, 600, 600 n.4 (holding that the plaintiffs were not seeking as damages compensation for workers' compensation benefits, and noting that the defendants, on remand, are still fee to challenge particular damage claims on the ground that the WDCA renders them compensable so as to bar them under its exclusive-remedy provision). As the Court of Appeals later clarified, *Broadus* never held that the failure to pay workers' compensation benefits based upon the facts there enabled the plaintiff to recover on his IIED claim. *Lisecki v. Taco Bell Restaurants, Inc.*, 150 Mich. App. 749, 755 n. 1 (1986). Thus, contrary to Plaintiffs' assertion, neither *Atkinson nor Broadus* sustains a IIED claim based merely upon the fraudulent denial of workers' compensation benefits. (Reply at 4, 6.)

Moreover, in *Hajciar v. Crawford & Co., the* Michigan Court of Appeals even held that a claim that the defendant terminated the plaintiff's workers' compensation benefits to coerce the plaintiff into accepting a lump-sum payment that he had previously refused failed to state the requisite "extreme and outrageous" conduct and, thus, failed to state an IIED claim. 142 Mich. App. 632, 634, 639 (1985). *In Lisecki v. Taco Bell Restaurants, Inc.*, the Court of Appeals held that "[t]he facts in *Hajciar* were essentially identical to those presented here, i.e., an allegation by the plaintiff that ... [the defendant] wrongfully terminated [his compensation benefits] . . . to further some ulterior motive of the defendants rather than due to the plaintiff's" non-entitlement to those benefits. 150 Mich. App. at 755 (holding so where the plaintiff alleged that the defendant had colluded to claim falsely that the plaintiff's physician had informed the claims' adjuster that the plaintiff had been released to work and where the plaintiff was later discharged from employment and denied workers' compensation benefits). According to the Court, "such conduct simply cannot be characterized as outrageous and atrocious." -Id. (noting that the plaintiff had an adequate remedy for the termination of benefits with his WDCB claim).

Plaintiffs' complaint asserts that Defendants engaged in a "continuous pattern of harassment, abuse, and unethical conduct." *See Hailes v. Liberty Mutual -Ins. Co.*, No. 215509 (Mich. App. Dec. 28, 1999) (suggesting that "facts evidencing a continuous pattern of harassment, abuse, and unethical conduct" may constitute the requisite "extreme and outrageous conduct" for purposes of stating an IIED claim). Yet, as Crawford aptly notes, it fails to allege any facts that would evidence such conduct. (Crawford Br. at 9.) Rather, as Plaintiffs seemingly concede, the factual allegations underlying their IIED claims simply evidence Defendants' alleged fraudulent denial of Plaintiffs' workers' compensation benefits. (Resp. to Crawford at 6.)

Thus, Plaintiffs' IIED claims fail to state claims for which relief may be granted and are subject to dismissal under Rule 12(b)(6).[2714]

III. SUMMARY

For the preceding reasons, the Court:

1) DISMISSES Plaintiffs' RICO claims

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[14] In its motion to dismiss, Cassens maintains that § 301 of the LMRA preempts Plaintiffs' IIED claims because those claims arise from Article 41 of the National CBA and are "inextricably intertwined with" the interpretation of the terms of that CBA. (Cassens Br. at 9.) Because Plaintiffs' RED claims fail to state claims for which relief may be granted under Michigan law, the Court need not and does not reach this issue.

because they fail to state claims for which relief may be granted, and because the WDCA reverse-preempts those claims under the McCarran-Ferguson Act; and

2) DISMISSES Plaintiffs' state-law claims of intentional infliction of emotional distress against Defendants for failure to state claims for which relief may be granted.

SO ORDERED

s/Paul D. Borman
PAUL D. BORMAN
UNITED STATES DISTRICT JUDGE

Dated: July 15, 2005

CERTIFICATE OF SERVICE

Copies of this Order were served on the attorneys of record by electronic means or U.S. Mail on July 18, 2005

S//Jonie Parker

Case Manager

UNITED STATES DISTRICT COURT

IN THE EASTERN DISTRICT OF MICHIGAN

PAUL BROWN,
WILLIAM FANALY,
CHARLES THOMAS
GARY RIGGS,
ROBERT ORLIKOWSKI, Case No.: 04-CV 72316

SCOTT WAY, Hon. Paul D. Borman

Plaintiffs,

v

CASSENS TRANSPORT
COMPANY and CRAWFORD
& COMPANY, foreign
corporations, and DR. SAUL MARGULES,

Defendants.

____/

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____/

PLAINTIFFS' MOTION FOR LEAVE TO FILE AMENDMENT TO COMPLAINT

Plaintiffs move under FRCP 15 for leave to file an amendment to their RICO complaint, adding parts E, F, G, H, and I to paragraph 6:

> E. Plaintiff William Fanaly alleges the following predicate acts of fraud in violation of 18 USC section 1341 and 1343, based on misrepresentations by defendants to officials of the Workers Compensation Agency and or to the Agency's Magistrates, upon which they relied, proximately causing damage to plaintiff. These acts are in addition to the predicate acts alleged below in the complaint of William Fanaly.
>
> (1) A Notice of Dispute mailed by Tina Litwiller on Dec. 19, 2001, concerning the denial of benefits to William Fanaly was sent via US Mail to the Workers Compensation Agency (at the time the Bureau of Workers' Disability Compensation) at po box 30018, Lansing MI 48909. The Notice fraudulently stated that Mr. Fanaly was denied benefits because "injury not work related." This statement was fraudulent because Cassens and its claims adjusters knew that an injury which happens to an employee while he is leaving

his motel during the course and scope of employment, such as occurred to Mr. Fanaly, is an injury which is compensable under the Act. The Agency relied upon the truthfulness of the statement in the Notice of Dispute to the extent that it took no action to punish Cassens as a self insurer. MCL 418.631 provides that the Agency may punish a self-insurer who "unreasonably fails to promptly pay claims" by revoking its privelege of self-insurance. Defendants' deception to the Agency proximately injured plaintiff William Fanaly by depriving him of timely and prompt payment of his workers compensation benefits, and as further alleged in this complaint.

(2) On Feb. 21, 2002, Tina Litwiller, a claim adjuster for Crawford & Company in St. Louis, MO, sent to the Agency via US Mail, at the above address, a Notice of Dispute concerning the shoulder injury of 2/17/02, which stated that workers compensation benefits were denied because "condition is chronic - per Dr. Marglious [sic]." This statement was false and fraudulent for reasons stated in the complaint of William Fanaly. The Agency relied upon the truthfulness of the statement in the Notice of Dispute to the extent that it took no action to punish Cassens as a self insurer. MCL 418.631 provides that the Agency may punish a self-insurer who "unreasonably fails to promptly pay claims" by revoking its privelege of self-insurance. Defendants' deception to the Agency proximately injured plaintiff William Fanaly by depriving him of timely and prompt payment of his workers compensation benefits, and as further alleged in this complaint.

F. Plaintiff Charles Thomas alleges the

following predicate acts of fraud in violation of 18 USC section 1341 and 1343, based on misrepresentations by defendants to officials of the Workers Compensation Agency and or to the Agency's Magistrates, upon which they relied, proximately causing damage to plaintiff. These acts are in addition to the predicate acts alleged below in the complaint of Charles Thomas.

(1) Charles Thomas incorporates here the allegations in paras 22-29 of this Complaint. Despite having possession of the Attending Physician's Statement referred to in para 22, which established that plaintiff was disabled from work due to a job-related injury, Tina Litwiller of Crawford and Company, in St.Louis, MO, mailed via the US Postal Service, on or about 1/21/02, to the Workers Compensation Agency at the above address, a Notice of Dispute denying workers compensation benefits and stating "no medical establishing causation." Litwiller's statement was fraudulent and in violation of 18 USC §1341 because she possessed a medical statement establishing causation.

Defendants also committed mail fraud in that their pleadings in the workers compensation case fraudulently denied that plaintiff suffered a work-related injury when they had knowledge that plaintiff had suffered a work-related injury. The Agency and or the Agency's Magistrate relied upon the truthfulness of the statements in the Notice of Dispute and pleadings to the extent that it took no action to punish Cassens as a self insurer. MCL 418.631 provides that the Agency may punish a self-insurer who "unreasonably fails to promptly pay claims" by revoking its privelege of self-insurance.

Defendants' deception to the Agency and to the Agency's Magistrate proximately injured plaintiff Charles Thomas by depriving him of timely and prompt payment of his workers compensation benefits, and as further alleged in this complaint.

G. Plaintiff Paul Brown alleges the following predicate acts of fraud in violation of 18 USC section 1341 and 1343, based on misrepresentations by defendants to officials of the Workers Compensation Agency and or to the Agency's Magistrates, upon which they relied, proximately causing damage to plaintiff. These acts are in addition to the predicate acts alleged below in the complaint of Paul Brown.

(1) Paul Brown incorporates here the allegations in paras 30-46 of this Complaint. On March 19, 2002, Tina Litwiller, a claim adjuster for Crawford & Company in St. Louis, MO, sent to the Agency, at the above address, via the US mail, a Notice of Dispute stating that workers compensation benefits were denied because "medical condition not work related." This statement was fraudulent for reasons set forth in the complaint of Paul Brown. Defendants' sending of this fraudulent statement via the mail violated 18 USC section 1341. The Agency and or the Agency's Magistrate relied upon the truthfulness of the statements in the Notice of Dispute and pleadings to the extent that it took no action to punish Cassens as a self insurer. MCL 418.631 provides that the Agency may punish a self-insurer who "unreasonably fails to promptly pay claims" by revoking its privelege of self-insurance. Defendants' deception to the Agency and to the Agency's Magistrate proximately injured plaintiff Paul Brown by depriving him of timely and prompt payment

of his workers compensation benefits, and as further alleged in this complaint.

H. Plaintiff Gary Riggs alleges the following predicate acts of fraud in violation of 18 USC section 1341 and 1343, based on misrepresentations by defendants to officials of the Workers Compensation Agency and or to the Agency's Magistrates, upon which they relied, proximately causing damage to plaintiff. These acts are in addition to the predicate acts alleged below in the complaint of Gary Riggs.

(1) Mr. Riggs incorporates here paragraphs 47-54 of his complaint. On February 18, 2004, Tina Litwiller, claim adjuster for Crawford in St. Louis, MO, mailed via the US mail to the Agency, at the above address, a Notice of Dispute, informing plaintiff that his workers compensation benefits were terminated.. This notice contained the statement, "waiting on handicap information, physician medical report in regards to disability." This statement was fraudulent, because Cassens and Crawford had been given by John Charters, in 2003, the information and reports. These fraudulent statement via the mail and or wire violated 18 USC section 1341 and 1343. The Agency and or the Agency's Magistrate relied upon the truthfulness of the statements in the Notice of Dispute and pleadings to the extent that it took no action to punish Cassens as a self insurer. MCL 418.631 provides that the Agency may punish a self-insurer who "unreasonably fails to promptly pay claims" by revoking its privelege of self-insurance. Defendants' deception to the Agency and to the Agency's Magistrate proximately injured plaintiff Gary Riggs by depriving him of timely and prompt payment of his workers

compensation benefits, and as further alleged in this complaint.

I. Plaintiff Robert Orlikowski alleges the following predicate acts of fraud in violation of 18 USC section 1341 and 1343, based on misrepresentations by defendants to officials of the Workers Compensation Agency and or to the Agency's Magistrates, upon which they relied, proximately causing damage to plaintiff. These acts are in addition to the predicate acts alleged below in his complaint (paras 55-65).

(1) 58. On November 21, 2000, Tina Litwiller, claim adjuster for Crawford in St. Louis, MO, mailed via the US mail to the Agency, at the above address, a Notice of Dispute, informing plaintiff that his workers compensation benefits were denied on the grounds "injury not work related" "based on opinion of authorized physician." This statement was fraudulent for reasons stated in his complaint, and because Litwiller, Cassens and Crawford knew plaintiff would be entitled to benefits if he had suffered an "acute knee strain" at work, or if plaintiff had a "severe abnormality" which was to some degree work related even if "not particularly work related," or if plaintiff's years of work for Cassens had contributed to arthritis arising from the 1980 non-work-related injury (a possibility not discussed in Dr. Margules' written report). Litwiller could have denied benefits on the ground "further investigation required," but instead made the affirmative statement "injury not work related." These fraudulent statements via the mail and or wire violated 18 USC section 1341 and 1343. The Agency and or the Agency's Magistrate relied upon the

truthfulness of the statements in the Notice of Dispute and pleadings to the extent that it took no action to punish Cassens as a self insurer. MCL 418.631 provides that the Agency may punish a self-insurer who "unreasonably fails to promptly pay claims" by revoking its privelege of self-insurance. Defendants' deception to the Agency and to the Agency's Magistrate proximately injured plaintiff Robert Orlikowsi by depriving him of timely and prompt payment of his workers compensation benefits, and as further alleged in this complaint.

BRIEF IN SUPPORT OF MOTION

If a misrepresentation is required in a RICO mail or wire fraud claim, it may be directed to persons other than the plaintiff. At least two cases have held that a plaintiff properly alleges RICO mail fraud where he asserts the false statements were directed not to him but third persons. *Proctor & Gamble,* supra, 242 F3d at 546-5, *Mid Atlantic Telecom, Inc v Long Distance Services, Inc,* 18 F 3d 260, 263 (4th Cir 1994). In both of these cases, the plaintiff alleged the misrepresentations were made to customers in the marketplace in which the corporation competed.

Here, plaintiff's amendments allege basically that the Notices of Dispute contained misrepresentations sent to the Michigan Workers Compensation Agency (its officials and or its magistrates), and that the Agency and or Magistrate relied on the misrepresentations, proximately causing injury to plaintiff. These amendments are proper and should be permitted under FRCP 18.

Marshall Lasser P25573
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Dated: Nov. 23, 2004

NOTICE OF DISPUTE

Michigan Department of Labor & Economic Growth
Workers' Compensation Agency
P O Box 30016, Lansing, MI 48909

1. Social Security No.	2. Date of Injury	3. Employee Name (Last, First, MI)	
4. Employee Address (Street No. and Name)	5. City	6. State	7. Zip Code
8. Employer Name			9. Federal ID No.
10. Employer Street Address	11. City	12. State	13. Zip Code
14. Carrier or Self-Insured Name		15. NAIC or Self-Insured No.	16. Zip Code
17. Service Company/TPA Name (if applicable)		18. Service Co./TPA ID No.	19. Zip Code
20. Claim or File No.	21. County of Injury		22. County Code (if known)

23. Reason for Dispute

A. ____ Injury not work related
B. ____ Medical treatment not related to injury
C. ____ Further investigation required (please specify below)
D. ____ Additional information required from employee (please specify below)
E. ____ Vocational rehabilitation dispute only (please specify below)
F. ____ Other (please specify below)

Making a false or fraudulent statement for the purpose of obtaining or denying benefits can result in criminal or civil prosecution, or both, and denial of benefits.	Authority: Workers' Disability Compensation Act, R408.33 (1) Completion: Mandatory Penalty: Workers' Disability Compensation Act, 418.631; 418.901; R408.33

This is to certify that a copy of this form has been mailed or given to the injured employee.

24. Preparer's Name (Please print)	25. Signature	26. Telephone No.	27. Date

NOTICE TO EMPLOYEE

By filing this form, your employer or its workers' compensation insurance company has indicated to the Workers' Compensation Agency that it has a question or a dispute concerning the possible workers' compensation benefits to which you may be entitled. You may or may not agree with the position taken by the employer or insurance company.

If you feel that you are not receiving the benefits to which you are entitled, you should discuss this with your employer or a representative of its insurance company. If you have already done that or you are not satisfied with the discussion, you may file a formal application for mediation or hearing. You can obtain the appropriate forms or more information by contacting the Workers' Compensation Agency at our toll-free number of 1-888-396-5041 (if necessary, a TTY device is available at 517-322-5987). Additional information may also be found on our website at www.michigan.gov/wca.

The Department of Labor & Economic Growth will not discriminate against any individual or group because of race, sex, religion, age, national origin, color, marital status, disability, or political beliefs. If you need assistance with reading, writing, hearing, etc., under the Americans with Disabilities Act, you may make your needs known to this agency.

WC-107 (Rev. 1 /04)

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STATUTES

FEDERAL

18 U.S.C. § 1341

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,... for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for maill matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,00,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1843

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,00,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1961. Definitions

As used in this chapter

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471,472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers),

section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 23412346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership,

corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this

chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a vio0lation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall stop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

STATE STATUTES AND ADMINISTRATIVE RULE

MCL Sec. 301. (1) An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act. In the case of death resulting from the personal injury to the employee, compensation shall be paid to the employees' dependents as provided in this act. Time of injury or date of injury as used in this act in the case of a disease or in the case of an injury not attributable to a single event shall be the last day of work in the employment in which the employee was last subjected to the conditions that resulted in the employee's disability or death.

MCL 418.315. (1) The employer shal'. furnish, or cause to be furnished, to an employee who receives a personal injury arising out of and in the course of employment, reasonable medical, surgical, and hospital services and medicines, or other attendance or treatment recognized by the laws of this sate as legal, when they are needed. However, an employer is not required to reimburse or cause to be reimbursed charges for an optometric service unless that service was included in the definition of practice of optometry under section 17401 of the public health code, 1978 PA 368, CL 333.17401, as of May 20 1992. An employer is not required to reimburse or cause to be reimbursed charges of services performed by a profession that was not licensed or registered by the laws of this state of or before January 1, 1998, but that becomes licensed, registered, or otherwise recognized by the laws of this state after January 1, 1998. Attendant or nursing care shall not be ordered in excess of 56 hours per week if the care is to be provided by the employee's spouse, brother, sister, child, parent, or any combination of these persons. After 10 days from the inception of medical care as provided in this section, the employee may treat with a physician of his or her own choice by giving to the employer the name of the physician and his or her own choice by giving to the employer the name of the physician and his or her intention to treat with the physician. The employer or the employer's carrier may file a petition objecting to the named physician selected by the employee and setting forth reason for the objection. If the employer or carrier can show cause why the employee should not continue treatment with the named physician of the employee's choice, after notice to all parties and a prompt hearing by a worker's compensation magistrate, the worker's compensation magistrate may order that the employee discontinue treatment with the named physician or pay for the treatment received from the physician from the date the order is mailed. The employer shall also supply to the injured employee dental service, crutches, artificial limbs, eyes, teeth, eyeglasses, hearing apparatus, and other appliances necessary to cure, so far as reasonably possible, and relieve from the effects of the injury. If the employer fails, neglects, or refuses so to do, the employee shall be reimbursed for the reasonable expense paid by the employee, or payment may be made in behalf of the employee to persons to whom the unpaid expenses may be owing, by order of the worker's compensation magistrate. The work's compensation magistrate may prorate attorney fees at the contingent fee rate paid by the employee.

MCL 418.631. (1) If any insurer licensed to transact the business of workmen's compensation insurance within this state repeatedly or unreasonably fails to pay promptly claims for compensation for which it shall become liable or if it repeatedly fails to make reports to the director as provided in this act, the director may recommend to the commissioner of insurance that the license of the company be revoked, setting forth in detail the reasons for his recommendation. The commissioner shall thereupon furnish a copy of the report to the insurer and shall set a date for a hearing, at which both the insurer ad the director shall be afforded an opportunity to present evidence. If after the hearing the commissioner is satisfied that the insurer has failed to live up to al of its obligations under this act, he shall promptly revoke its license otherwise he shall dismiss the complaint.

Rule 408.33. (1) On or before the fourteenth day after the employer has notice or knowledge of an alleged injury or death, a carrier and the self-insurers' security found shall notify the bureau, on form 107, if the right of the injured or dependent to compensation is disputed. If compensation thereafter is paid, report it on form 701. A copy of form 107, notice of dispute, shall be mailed or given to the injured employee.

(2) The following subdivisions govern the administration and enforcement of the penalty provisions under section 801 of the act:

(a) Under section 801(a) of the act, compensation shall be paid promptly and directly to the person entitled to compensation. Weekly benefits become due and payable on the fourteenth day after the employer has notice of knowledge of the disability or death. On that date, all compensation which has accrued shall be paid. If benefits are not paid within 30 days of becoming due and payable, then the carrier shall pay to the employee $50.00 per day for each day after 30 days that the benefits remain unpaid, not to exceed $1,500.00.

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No. 07-1283

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In The
Supreme Court of the United States

◆

PAUL BROWN, WILLIAM FANALY,
CHARLES THOMAS, GARY RIGGS,
ROBERT ORLIKOWSKI, and SCOTT WAY,

Petitioners,

v.

CASSENS TRANSPORT CO. and
CRAWFORD & COMPANY, foreign corporations,
and DR. SAUL MARGULES,

Respondents.

◆

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

◆

BRIEF IN OPPOSITION

◆

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QUESTION PRESENTED

Whether Petitioners' civil RICO claim based on alleged mail and wire fraud in the filing of notices by Respondents disputing Petitioners' entitlement to workers compensation benefits was properly dismissed where Petitioners failed to adequately plead that they relied upon the alleged fraud to their detriment so as to satisfy the requirement of 18 U.S.C. §1964(c) of injury "by reason of" the alleged fraud.

DISCLOSURE STATEMENT

Cassens Transport Company is wholly owned by Cassens Corporation. No publicly held company owns 10% or more of the stock of Cassens Transport Company or Cassens Corporation.

Crawford & Company has no parent entity and is publicly traded. No publicly held company owns 10% or more of the stock of Crawford & Company.

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INTRODUCTION

The Court has already considered and rejected another petition for writ of certiorari filed by counsel for Petitioners in this case which was based on facts and questions of law which are virtually identical to those presented here. The Respondents respectfully submit that the Court's rejection of the petition in that matter, *Yax v UPS*, 127 S. Ct. 2428 (2007), was well-founded and that even more compelling reasons exist to deny this Petition.

This matter involves Petitioners' allegation that the Respondents violated that Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961, *et seq*. (RICO) by contesting their claims for workers compensation benefits. Specifically, Petitioners assert that Cassens Transport Company, their employer, conspired with Crawford & Company, a third-party workers compensation administrator and Dr. Saul Margules, a physician who conducted independent medical examinations of Petitioners, to deny Petitioners' workers compensation claims, although the Respondents were allegedly aware of facts which would support those claims. Petitioners claim that they suffered damages under RICO based upon the suspension of their workers compensation benefits pending resolution of their workers compensation claims by the Michigan Worker's Compensation Agency (WCA).[1]

Although Petitioners urge the Court to grant their Petition to address whether a RICO plaintiff asserting the predicate act of mail or wire fraud must plead justifiable reliance upon a misrepresentation by the defendant, this case, like *Anza v Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), may be resolved without addressing that issue. Respondents' expression of their position that the Petitioners were not entitled to benefits through the filing of Notices of Dispute with the WCA was not the proximate cause of the suspension of the Petitioners' workers compensation benefits. By giving notice that they intended to dispute the Petitioners' workers compensation claims, the Respondents merely initiated the dispute resolution process administered by the WCA. A denial of benefits resulting from that process could occur for any number of reasons, including the failure of a claimant to satisfy any element of his or her claim or a failure to satisfy procedural requirements. A claimant may also voluntarily decide to redeem his or her claim for reasons wholly unrelated to the dispute. Thus, any proceedings which would follow if Petitioners' claims are permitted to proceed would likely be highly speculative. As the Petitioners either received their workers compensation benefits or voluntarily settled their claims, a civil RICO claim by Petitioners presents a substantial risk of duplicative recovery. Thus, regardless of whether justifiable reliance is required, the Petitioners could not satisfy the proximate cause requirement to maintain a civil RICO action under 18 U.S.C. §1964(c).

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[1] The workers compensation claims of each of the Petitioners which were pending at the time their RICO Complaint was filed were either redeemed (settled) or resolved based upon a voluntary payment of benefits by Respondent Cassens or a determination that benefits were owed.

Further, this case provides a poor vehicle to address the question of whether reliance is a required element of a civil RICO claim predicated on mail or wire fraud, and if so, whether such reliance must be by the plaintiff. As recognized by the United States Court of Appeals for the Sixth Circuit in its Opinion below, the Petitioners failed to appeal the decision of the United States District Court for the Eastern District of Michigan denying their motion to amend their Complaint to allege third-party reliance by the WCA. Thus, the issue of whether reliance by one other than the Petitioners is sufficient to support a civil RICO mail or wire fraud claim was not preserved for consideration by the Sixth Circuit and thus is also beyond consideration by this Court in the context of the present Petition. Further, this Court has already agreed to consider another petition for writ of certiorari in Docket No. 07-210, *Bridge v Phoenix Bond & Indemnity*, which does not present the same impediment to full consideration of the reliance question.

STATUTES INVOLVED IN THE CASE

Federal

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1964(c)

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

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COUNTERSTATEMENT OF THE CASE

I. STATUTORY AND FACTUAL BACKGROUND

In Michigan, the provision of workers compensation insurance, including the determination of compensability of an alleged work-related injury, is regulated by the Michigan Worker's Disability Compensation Act (WDCA), MCL §418.101, *et seq.* The Act permits an employer to provide workers compensation coverage either by purchasing a policy of insurance or via self-insurance. MCL §418.121. Workers compensation benefits provided pursuant to such an insurance policy or self-insurance is the exclusive remedy against an employer for personal injury or occupational disease, except when the injury is the result of an intentional tort. MCL §418.131. The Act prohibits the employer from asserting certain defenses to liability, such as employee negligence or assumption of risk. MCL §418.141. Within two weeks of notice of a compensable injury, an employer is obligated to pay weekly workers compensation benefits to an employee who establishes such an injury. MCL §418.801(1).

An employer has the right under the WDCA to dispute the payment or continued payment of workers compensation benefits by filing a Notice of Dispute with the Workers Compensation Agency and serving a copy of the Notice upon the employee claiming benefits. MCL §§418.841(1), 418.847(1). The filing of a Notice of Dispute is by no means a final determination of an employee's entitlement to workers compensation benefits. Rather, the Notice of Dispute serves to initiate the administrative dispute resolution process under the WDCA. If his or her claim has been disputed, an employee has the right to a hearing before a WCA magistrate. MCL §§418.222, 418.851. The magistrate's decision may be reviewed by the Workers Compensation Appeal Board, and ultimately, the Michigan appellate courts. MCL §418.861.

Under the WDCA, an insurer's license to transact the business of workers compensation insurance within the state may be revoked if it repeatedly or unreasonably fails to promptly pay claims for compensation for which it is liable. Similarly, an employer who is a self-insurer may have its privilege of self-insurance revoked for engaging in such acts. MCL §418.631. Also, the WCA may dismiss a claim for review, assess costs or take other disciplinary action when it has determined that a claim or proceeding is vexatious because, among other reasons, it was taken without reasonable basis for belief that there was a meritorious issue on appeal. MCL §418.861b.

Petitioners are current or former employees of Respondent, Cassens Transport Company, who made claims for benefits under the Michigan Worker's Disability Compensation Act. Cassens Transport Company is an approved self-insurer in Michigan for workers compensation liability. Pursuant to a contract with Cassens Transport, Respondent, Crawford & Company acts as a workers compensation claim administrator for Cassens and adjusts workers compensation claims made by Cassens employees. Dr. Margules is the independent medical examiner who performed physical examinations of the Petitioners concerning their claims.

II. SUMMARY OF PROCEDURAL EVENTS

On June 21, 2004, Petitioners filed their Complaint which alleges, in essence, that Respondents engaged in a pattern of racketeering activity which violated RICO by asserting their right under the WDCA to adjudicate the Petitioners' claims for workers compensation benefits. Specifically, the Complaint alleges that Cassens conspired with Crawford & Company and a physician, Respondent, Dr. Saul Margules, to deny Petitioners' workers compensation claims although Cassens, Crawford, and/or Dr. Margules were aware of facts which would support the validity of those claims. The Complaint further alleges that Cassens and Crawford selected unqualified doctors, such as Dr. Saul Margules, to obtain medical opinions which defendants could use to deny benefits to plaintiffs, " . . . rather than to get an objective opinion from a qualified specialist to help defendants decide whether plaintiffs were entitled to benefits." (App. 1, Complaint, ¶6.B.) Similar allegations are made throughout the Complaint. (App. 1, Complaint ¶¶11, 32, 37, 56, 68, and 69) Although Petitioners now assert that their Complaint alleged that the Respondents "targeted" Petitioners and that fraudulent Notices of Dispute were sent to the Workers Compensation Agency, neither allegation appears on the face of the Complaint. Rather, the Complaint merely alleges, in pertinent part, that the Respondents engaged in mail fraud by sending Notices of Dispute by U.S. Mail to the Petitioners. Petitioners assert that Respondents' alleged actions violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961, *et seq*. Petitioners further allege that the actions of Respondents intentionally inflicted emotional distress upon Petitioners.

In separate motions, Cassens and Crawford moved to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6). All Respondents joined in those motions. On July 15, 2005, the District Court entered its Opinion and Order granting these motions and dismissing the Complaint. (Pet. App. 34, *Brown v Cassens Transport Co.*, 409 F. Supp. 2d 793 (E.D. Mich, 2005)) The Court dismissed Petitioners' claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) as they failed to state claims upon which relief could be granted. In pertinent part, the Court concluded that the Petitioners' injuries arose, not from their reliance upon the allegedly fraudulent communications, but rather, from the Respondents' dispute of Petitioners' workers compensation claims. 409 F. Supp. 2d 793, 807. The Court further held that dismissal of Petitioners' RICO claims was appropriate because the Worker's Disability Compensation Act reverse-preempted Petitioners' claims under the McCarran-Ferguson Act. The Court also dismissed the Petitioners' state law claims of intentional infliction of emotional distress for failure to state claims for which relief may be granted.

Also, on July 15, 2005, Petitioners filed their Motion for Leave to File Amendment to Complaint. This Motion was denied by the District Court on July 22, 2005 as the Court had issued its Opinion and Order Granting Defendants' Motions to Dismiss Plaintiffs' Complaint under Rule 12(b)(6) on the same date that the Motion for Leave to File Amendment to Complaint was filed. (Pet. App. 32, Opinion and

Order Denying Plaintiffs' Motion for Leave to File Amendment to Complaint) On July 28, 2005, Petitioners filed their Notice of Appeal to the United States Court of Appeals for the Sixth Circuit from the District Court's "Opinion and Order Granting Defendants' Motion to Dismiss Plaintiffs' Complaint Under Rule 12(b)(6) entered on July 15, 2005." (App. 36) Petitioners did not file a Notice of Appeal as to the District Court's July 22, 2005 Order Denying Plaintiffs' Motion for Leave to File Amendment to Complaint.

On July 10, 2007, a panel of the Sixth Circuit issued its Opinion affirming the District Court's dismissal of the Petitioners' RICO claims as they failed to plead detrimental reliance on Respondents' alleged misrepresentations concerning the cause of their injuries. (Pet. App. 9) Contrary to Petitioners' assertion, the Opinion, authored by the Hon. Julia Smith Gibbons, did not urge this Court to overturn the Sixth Circuit's uniform precedent established in numerous decisions, including *Bender v Southland Corp.*, 749 F.2d 1205 (6th Cir., 1984), nor did it state that the panel would overturn *Bender* and abandon the requirement that reliance upon a fraudulent representation be pled by a civil RICO plaintiff alleging mail fraud as a predicate act. Rather, the Opinion expressly rejected the Petitioners' argument that this Court's decisions in *Neder v United States*, 527 U.S. 1 (1999) and *Sedima, S.P.R.L. v Imrex Co.*, 473 U.S. 479 (1985) preclude the requirement that reliance be established to satisfy the standing requirement of 18 U.S.C. §1964(c). Further, the Opinion concluded that the precedent of most other circuits required that reliance, either by the plaintiff or a third party, be pled to establish proximate causation when the predicate act is mail fraud. *Brown v Cassens Transport Co.*, 492 F.3d 640, 644-646 (6th Cir., 2007) En banc review of the Opinion was denied on December 20, 2007. (Pet. App. 3)

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REASONS THE PETITION SHOULD BE DENIED

I. PETITIONERS CANNOT ESTABLISH PROXIMATE CAUSE, THUS THIS CASE MAY BE RESOLVED WITHOUT CONSIDERATION OF THE ROLE OF DETRIMENTAL RELIANCE IN A CIVIL RICO CLAIM BASED UPON MAIL FRAUD

The Racketeer Influenced and Corrupt Organizations Act authorizes civil suits against persons who participate in the conduct of an enterprise through a pattern of "racketeering activity". "Racketeering activity" is defined in 18 U.S.C. §1961 to include acts which are indictable under various provisions of Title 18 of the United States Code, including 18 U.S.C. §1341, prohibiting mail fraud and 18 U.S.C. §1343, prohibiting wire fraud. 18 U.S.C. §1964(c) permits "any person injured in his business or property by reason of" a violation of 18 U.S.C. §1962, which generally prohibits a conspiracy to conduct the affairs of an enterprise through a pattern of racketeering activity, to bring suit and recover treble damages and attorneys fees based upon the claim.

This Court, in *Holmes v Securities Investor Protection Corp.*, 503 U.S. 268 (1992), held that a plaintiff may sue under 18 U.S.C. §1964(c) only if the alleged RICO violation was the proximate cause of the plaintiff's injury. Further guidance as to the proper interpretation of the "by reason of" provision of 18 U.S.C. §1964(c) was provided in *Anza v Ideal Steel Supply Corp.*, 547 U.S. 541, 126 S. Ct. 1991 (2006). In *Anza,* this Court considered the underlying premises of the proximate cause requirement and concluded, without addressing whether reliance is required to satisfy 18 U.S.C. §1964(c) when the predicate act is mail fraud, that Anza's conduct was not the direct cause of Ideal's injuries. In reaching this conclusion, the Court identified several guideposts to be used in an analysis of proximate cause under 18 U.S.C. §1964(c), including (1) whether the plaintiff's damages may have resulted from factors other than the defendant's alleged fraud; (2) whether the claim presents an appreciable risk of duplicative recoveries; (3) the degree to which the proceedings which would follow if the claim is permitted would be speculative; and (4) whether the immediate victim of the alleged RICO violation can be expected to vindicate the laws by pursuing its own claims. 126 S. Ct. 1991, 1997-1998.

Application of these guideposts to the Petitioners' claims makes clear that they cannot establish that the Respondents' allegedly fraudulent Notices of

Dispute proximately caused their claimed injuries. Initially, Petitioners claim that their injuries were caused by Respondents' allegedly fraudulent statements because they ceased receiving workers compensation benefits upon the filing of the Notices of Dispute. (Petition, pg. 5) Nonetheless, it is clear from the Complaint that the WCA did not immediately issue a determination denying any Petitioner benefits based upon receipt of the Notice, but rather, commenced the administrative fact-finding process to determine eligibility for benefits. In making such determinations, the WCA weighs evidence, including medical opinions, presented by each party in support of its position. The issuance of a Notice of Dispute in a workers' compensation matter by an employer, regardless of whether it may be fraudulent, is not a final disposition of a workers' compensation claim absent acquiescence by the claimant. Where the claimant does not acquiesce in (or rely upon) the Notice of Dispute, the claimant's entitlement to benefits is controlled by the relative weight of the evidence presented by the claimant and the employer to the WCA. A claimant who litigates his/her entitlement to benefits but who does not offer sufficient evidence to support that claim does not receive benefits regardless of the basis for the Notice of Dispute. Thus, the alleged inclusion of fraudulent statements in a Notice of Dispute could not have led directly to the suspension of the Petitioners' workers compensation benefits.

Second, permitting a RICO claim in this case presents an appreciable risk of duplicative recovery. Although the Complaint in this matter was filed during the pendency of their workers compensation claims before the WCA, some of the Petitioners were subsequently awarded benefits. Respondent Cassens agreed to voluntarily pay the benefits of others and some of the Petitioners' claims were settled. Under the WCA, an award of benefits is retroactive and includes an award of statutory attorneys fees. MCL §§418.858(2), 418.862. Thus, an award of treble damages and attorneys' fees to Petitioners under RICO could actually result in a quadruple recovery.

Third, the risk of speculative proceedings if Petitioners' claims were permitted to proceed is high. Particularly as to any Petitioner who chose to settle his claim, a trier of fact would be required to determine what the outcome would have been had the case been adjudicated, the Petitioner's reasons for settlement as well as to what extent, if any, a Petitioner's benefits might have been greater had the Respondents chosen to dispute their claims on grounds which were not arguably fraudulent. Such an analysis would require a complex evaluation of hypothetical presentations of evidence, procedural rulings and conclusions of law.

Also, the Worker's Compensation Disability Act provides the WCA, to which the Notices of Dispute were directed, with a state law mechanism to pursue appropriate remedies against an employer which unreasonably fails to promptly pay benefits or engages in vexatious proceedings as described in MCL §§418.631 and 418.861b. Thus, as in *Anza*, the WCA, to which the Notices were directed, has the means to pursue its own remedies for allegedly fraudulent representations by an employer.

For the reasons set forth above, the *Anza* rationale makes clear that the Petitioners could not establish that the Respondents' alleged mail fraud was the proximate cause of any of their alleged injuries. Thus, it is not necessary for the Court to reach the question of whether detrimental reliance by the Petitioners should also be required in order to resolve their claims. Therefore, the Petition should be denied.

II. THE QUESTION OF WHETHER RELIANCE BY A THIRD PARTY IS SUFFICIENT TO SUPPORT A CIVIL RICO MAIL FRAUD CLAIM CANNOT BE CONSIDERED IN THE CONTEXT OF THIS PETITION SINCE PETITIONERS FAILED TO SO PLEAD, MAKING THIS A POOR VEHICLE TO ADDRESS THE PROPER ROLE OF RELIANCE IN THE WAKE OF *ANZA*

The only allegations of reliance made in Petitioners' Complaint pertain to the Petitioners and not to third parties, such as the WCA. (App. 1, Complaint, ¶¶6C., 17, 25, 38, 42, 50, 61, 70) In fact, the only allegations in the Complaint concerning the mailing of allegedly fraudulent Notices of Dispute describe only mailings to the Petitioners. (App. 1, Complaint, ¶¶9, 14, 23, 35, 48, 58, 69) Thus, the Complaint on its face fails to plead the elements of third party reliance which Petitioners urge be adopted by this Court.

Although Petitioners have included in their Appendix their motion to amend their complaint to allege reliance by the WCA, this motion was denied by the District Court. (Pet. App. 32, Order Denying Motion for Leave to File Amendment to Complaint) The Petitioners did not file a Notice of Appeal as to this Order, and thus, failed to properly preserve the District Court's denial of their motion for review. (Pet. App. 9, *Brown v Cassens Transport Co.*, 492 F.3d 640, 645 at fn. 2 (6th Cir., 2007)) Thus, the question of whether reliance by a third party is sufficient to satisfy the requirements of 18 U.S.C. §1964(c) in the context of a civil RICO claim in which the predicate act is mail or wire fraud is not properly presented by this case. Denial of the Petition for this reason is also warranted.

III. THERE IS NO BASIS TO REVERSE THE DECISION BELOW AS THE SIXTH CIRCUIT CORRECTLY REQUIRED THAT THE PETITIONERS PLEAD DETRIMENTAL RELIANCE UPON A FRAUDULENT REPRESENTATION BY RESPONDENTS

A. Sixth Circuit Precedent Requiring Reliance by a Civil RICO Plaintiff Alleging Mail Fraud is Consistent With This Court's Jurisprudence

Petitioners argue that the Opinion of the Sixth Circuit in this case and the Sixth Circuit's prior decisions cited therein conflict with certain decisions of this Court. Initially, Petitioners cite *Neder v U.S.*, 527 U.S. 1 (1999) for the proposition that a civil RICO plaintiff claiming mail or wire fraud as a predicate act should merely be required to plead a fraudulent scheme using the mail or wires and not be required to plead reliance. *Neder* addresses the proofs required for violation of the federal mail fraud statute in a criminal case. It does not address the "by reason of" requirement of 18 U.S.C. §1964(c) applicable to civil RICO actions. Further, *Anza v Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1995-1996 (2006) underscores this Court's rejection of the argument that merely pleading a "scheme to defraud" relieves a civil RICO plaintiff of the requirement to establish proximate cause to satisfy 18 U.S.C. §1964(c).

Petitioners also rely upon footnote 19 in *Holmes v Securities Investor Protection Corp.*, 503 U.S. 258 (1992) to argue that this Court has rejected a reliance requirement because the footnote cited two cases which "approved RICO mail fraud complaints which did not allege common law fraud". Nonetheless, the referenced decisions, *Taffet v Southern Co.*, 930 F.2d 847 (11th Cir., 1991) and *County of Suffolk v Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir., 1990) reflect that third party reliance was present in *Taffet* and reliance was expressly required to satisfy 18 U.S.C. §1964(c) in *County of Suffolk*. Further, Petitioners' argument in this regard is not supported by the balance of the *Holmes* decision. Neither the language of *Holmes* nor the cited footnote demonstrates that the Opinion of the Sixth Circuit in this case conflicts with the precedent of this Court.

Petitioners also urge the adoption of their position based upon a statement in *Sedima, S.P.R.L. v Imrex Co.*, 473 U.S. 479 (1985) encouraging a liberal construction of RICO. Nonetheless, such a broad statement can hardly be read as an instruction to abandon the standing requirement for civil RICO claims. It is clear that *Sedima* intended to preserve RICO's standing requirement for civil claims. *Sedima, S.P.R.L., supra* at 495

Both *Holmes* and *Anza v Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006) make clear that this Court requires that a civil RICO plaintiff demonstrate standing as required by 18 U.S.C. §1964(c) by pleading and proving that the predicate act proximately caused his/her injuries. *Holmes v Securities Investor Protection Corp.*, 503 U.S. 258, 265-267 (1992); *Anza* at 1998. Further, this Court has applied common law principles of causation in interpreting RICO and other federal statutes. See *Beck v Prupis*, 529 U.S. 494 (2000) [applying common law of civil conspiracy in interpreting meaning of injury "by reason of" a conspiracy in civil RICO suit]; *Field v Mans*, 516 U.S. 59 (1995) [applying the Restatement (Second) of Torts in interpreting Bankruptcy Code exception to discharge of debts due to false representation or fraud as requiring reliance upon false representation]. This Court's recent decision in *Stoneridge Investment Partners, LLC v Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008) recognized the importance of reliance in establishing causation in the context of a private action based upon a fraudulent misrepresentation under §10b of the Securities Exchange Act. In that case, this Court observed:

> "Reliance by the plaintiff upon the defendant's deceptive acts is an essential element of the §10b private cause of action. It ensures that, for liability to arise, the 'requisite causal connection between a defendant's misrepresentation and a plaintiff's injury' exists as a predicate for liability. *Basic, Inc. v Levinson*, 485 U.S. 224, 243, 108 S.Ct. 978, 99 L.Ed. 2d 194 (1988); see also *Affiliated Ute Citizens of Utah v United States*, 406 U.S. 128, 154, 92 S.Ct. 1456, 31 L.Ed. 2d 741 (1972) (requiring "causation in fact")."

128 S. Ct. 761 at 769.

The recognized common law of causation in the context of a claim based upon fraudulent misrepresentation is set forth in Section 525 of the Restatement (Second) of Torts (1977). This Section provides that, to establish liability based upon a fraudulent misrepresentation, the plaintiff must demonstrate " . . . pecuniary loss caused to him by his justifiable reliance upon the misrepresentation." For the reasons set forth above, Respondents urge that the Sixth Circuit's requirement that a plaintiff demonstrate reliance on the defendant's misrepresentation to satisfy the "by reason of" requirement of 18 U.S.C. §1964(c) is supported by the holdings of this Court.

B. The Persuasive Authority of Most Circuits Supports the Requirement of Justifiable Reliance Upon a Fraudulent Misrepresentation Made by the Defendant to Establish Standing in a Civil RICO Claim in Which Mail or Wire Fraud is the Predicate Act

Contrary to Petitioners' assertions, other Courts of Appeals have consistently held that reliance upon a fraudulent misrepresentation made by the defendant must be pled in order to satisfy 18 U.S.C. §1964(c). *Bank of China, New York Branch v N.B.M., L.L.C.*, 359 F.3d 171 (2d Cir., 2004), *cert. granted in part*, 545 U.S. 1138 (2005), *cert. dismissed*, 126 S. Ct. 675 (2005); *Sikes v Teledyne, Inc.*, 281 F.3d 1350 (11th Cir., 2002), *cert. den.*, 537 U.S. 884 (2002); *Appletree Square I Limited v W.R. Grace & Co.*, 29 F.3d 1283

(8th Cir., 1994). Petitioners assert, based upon *Abels v Farmers Commodities Corp.,* 259 F.3d 910 (8th Cir., 2001), that the Eighth Circuit does not require a civil RICO plaintiff alleging mail or wire fraud to plead any misrepresentation by the defendant. Nonetheless, a close reading of the portion of *Abels* cited by Petitioners reveals that it does not discuss the elements necessary to establish standing under 18 U.S.C. §1964(c), but rather, the elements necessary to establish a "pattern of racketeering activity" under 18 U.S.C. §1962(c). Similarly, *Tabas v Tabas*, 47 F.3d 1280, 1294 (3d Cir., 1995), cited in support of Petitioners' argument that the Third Circuit does not require reliance to establish standing under 18 U.S.C. §1964(c), addresses instead the elements of mail fraud.

Petitioners also argue that *Schreiber Distributing v Serv-Well Furniture Co.,* 806 F.2d 1393 (9th Cir., 1986) holds that a civil RICO suit based upon mail fraud does not require reliance upon a misrepresentation by the defendant. *Schreiber Distributing,* which was decided prior to *Holmes v Securities Investor Protection Corp.,* 503 U.S. 258 (1992), fails to address the "by reason of" requirement of 18 U.S.C. §1964(c). In *Poulos v Caesars World, Inc.,* 379 F.3d 654 at 666 (9th Cir., 2004), the Ninth Circuit, citing *Holmes* and acknowledging the views of other circuits, expressly declined to address the question of whether reliance was always required to establish causation in a civil RICO case based upon mail or wire fraud. Thus, contrary to Petitioners' argument, the Ninth Circuit has expressly declined to address whether reliance must always be pled to establish standing under 18 U.S.C. §1964(c), the Eighth Circuit has expressly recognized the reliance requirement for this purpose and the Third Circuit has not addressed the issue.

Petitioners also argue that their Petition should be granted based upon decisions of the First, Fourth and Fifth Circuits holding that a civil RICO plaintiff relying upon the predicate acts of mail or wire fraud may satisfy the standing requirement of 18 U.S.C. §1964(c) by pleading reliance by a third person upon a fraudulent misrepresentation by the defendant. Initially, as discussed in detail above and as noted in the Sixth Circuit's Opinion in this case at 492 F.3d 640, 645 at fn. 2 (6th Cir., 2007), Petitioners' Complaint does not allege reliance by a third party upon fraudulent misrepresentations by Respondents. Thus, this case does not present the question of whether reliance by a third party upon a fraudulent misrepresentation is sufficient to establish standing under 18 U.S.C. §1964(c) and that issue would not properly be before the Court if the Petition is granted.

Also, Petitioners do not correctly characterize the positions articulated by the Fourth and Fifth Circuits concerning the reliance requirement. Subsequent to its decision in *Mid Atlantic Telecom, Inc. v Long Distance Services, Inc.*, 18 F.3d 260 (4th Cir., 1994), the Fourth Circuit held in *Chisholm v TranSouth Financial Corp.*, 95 F.3d 331 (4th Cir., 1996) and *American Chiropractic Assn., Inc. v Trigon Healthcare, Inc.*, 367 F.3d 212 (4th Cir., 2004), *cert.*

den., 543 U.S. 979 (2004), that, to establish proximate cause, a civil RICO plaintiff alleging mail or wire fraud as a predicate act must have justifiably relied upon the defendant's material misrepresentation. Similarly, the scope of the Fifth Circuit's decision in *Procter & Gamble Co. v Amway Co.,* 242 F.3d 539 (5th Cir., 2001) was substantially limited by that court's decision in *Sandwich Chef of Texas, Inc. v Reliance National Indemnity Insurance Co.,* 319 F.3d 205 (5th Cir., 2003), *cert. den.*, 540 U.S. 819 (2003). *Sandwich Chef of Texas, Inc.* reaffirmed the general rule in the Fifth Circuit that proximate cause in a civil RICO action based upon fraud requires that a misrepresentation by the defendant be relied upon by the plaintiff. 319 F.3d 205 at 219. Finally, although the First Circuit, in *Systems Management, Inc. v Louiselle*, 303 F.3d 100 (1st Cir., 2002) does hold that mailed misrepresentations to a third person could be the basis for mail fraud, that decision does not address the "by reason of" provisions of 18 U.S.C. §1964(c).

Contrary to Petitioners' assertion, the longstanding precedent of the Sixth Circuit is consistent with the majority of the circuits which have addressed the reliance issue. Thus, decisions of other circuits concerning the "by reason of" provisions of 18 U.S.C. §1964(c) do not warrant this Court's review of the Sixth Circuit's Opinion in this case.

C. Public Policy Supports the Conclusion that Civil RICO Claims Based Upon Mail or Wire Fraud Must Satisfy the Element of Reliance

The public policy implications associated with the outcome advocated by the Petitioners present a significant reason to deny the Petition. The result urged by the Petitioners would transform state law administrative proceedings over workers compensation benefits into federal civil RICO claims. Such a wholesale expansion of RICO would create parallel state and federal proceedings examining the bona fides of a workers compensation claimant's entitlement to benefits. Every employer which chose to dispute an employee's workers compensation claim would be exposed to the possibility that its filing of a notice of dispute with a state workers compensation agency could give rise to a civil RICO claim for mail or wire fraud. This Court has disfavored the expansion of causes of action where such expansion poses the risk that federal power would be used to invite litigation beyond the scope of federal law and into areas already governed by state law guarantees. *Stoneridge Investment Partners, LLC v Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 770-771 (2008). Respondents respectfully submit that the expansion posed by the Petitioners squarely presents such a risk, and thus, the Petition should not be considered by this Court.

◆

CONCLUSION

For the reasons set forth above, the Respondents urge that the Petition for Writ of Certiorari in this matter be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN

PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI, SCOTT WAY,

Plaintiffs,

v

CASSENS TRANSPORT COMPANY and CRAWFORD & COMPANY, foreign corporations, and DR. SAUL MARGULES,

Defendants.

______________________________/

Case No.: **04-72316**

PAUL D. BORMAN
MAGISTRATE
JUDGE CAPEL

There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in the complaint.

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______________________________/

(Filed Jun. 22, 2004)

COMPLAINT AND JURY DEMAND

JURISDICTION AND VENUE

1. Federal question jurisdiction is conferred by plaintiffs' claims under the Federal Racketeer Influence [sic] and Corrupt Organizations Act, 18 USC

§1961 et seq (RICO). Diversity of citizenship jurisdiction is conferred by 28 USC §1332 (plaintiffs are citizens of Michigan, defendants are citizens of other states, and the amounts in controversy exceed $75,000). Pendant jurisdiction of state claims is conferred by 28 USC §1367.

2. Venue is properly laid in the Federal District Court for the Eastern District of Michigan because plaintiffs reside in that district and defendants do business in person and through their agents and representatives in that district, in Wayne and Oakland Counties, Michigan. Dr. Saul Margules does business in Macomb County, MI, and resides within the jurisdiction of this court.

PARTIES

3. Plaintiffs Paul Brown, Robert Orlikowski, Gary Riggs and William Fanaly reside within the jurisdiction of the court. Charles Thomas resides in Pennsylvania. Scott Way resides in Three Rivers MI. All plaintiffs were or are employees of Cassens Transport Company in Wayne and Macomb Counties, Michigan. Cassens Transport and Crawford & Company are corporations domiciled outside Michigan. Cassens Transport is engaged in the business of interstate transportation of new cars, trucks and SUVs. Dr. Saul Margules does business in Macomb County, MI, and resides within the jurisdiction of this court.

ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

4. Cassens Transport employed each of the plaintiffs. It complied with its obligation, arising under the Michigan Workers Disability Compensation Act, MCL 401.101 et seq (herein "the Act"), to provide its Michigan employees Michigan workers disability compensation insurance, either by signing a contract of insurance with Crawford & Company or by self-insuring. Crawford & Company adjusted workers compensation claims made by Cassens' employees.

5. Decisions regarding paying claims or terminating payment were made jointly by defendants, or were made by Crawford & Company after consulting with Cassens, or were ratified by Cassens after being made by Crawford. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery. The persons with decision power at Cassens and Crawford formed an "enterprise" for purposes of the Racketeer Influenced and Corrupt Organizations Act (RICO).

6. A. One or more of these persons committed mail fraud, wire fraud and or conspiracy to defraud, in a repeated and continuing pattern, by fraudulently denying benefits. This fraud was accomplished in part by use of the United States mails and by electronic communications in violation of 18 USC 1341 and 1343, by and in violation of MCL 750.280. Some

of these electronic and mail communications did not contain fraudulent misrepresentations, as fraudulent misrepresentations were merely one of the means by which defendants achieved their scheme of fraud. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

B. This fraud was also accomplished in part by Cassens and Crawford deliberately selecting doctors such as Dr. Saul Margules to get a medical opinion which defendants could use to deny benefits to plaintiffs, rather than to get an objective opinion from a qualified specialist to help defendants decide whether plaintiffs were entitled to benefits. Crawford, Cassens and their attorneys knew Dr. Margules was a family doctor who was not trained or certified in orthopedic medicine, although most of the injuries suffered by Cassens employees were within the field of orthopedic medicine, as they involved bones, joints and muscles. Crawford, Cassens and their attorneys knew Margules and other doctors they employed to examine plaintiffs and other drivers were "cut off" doctors, that is, doctors upon whom Crawford and Cassens could rely for opinions which they could cite as grounds for cutting off or denying benefits, either by stating plaintiffs were able to work, or, if disabled, their injury was not work related. Dr. Margules and these other doctors had over many years received substantial income from defendants and their attorneys. Cassen's and Crawford's past payment of large sums of money for doing "cut off" reports in workers compensation litigation and the express or implied promise of future payment of money for doing such reports constituted corrupt persuasion, misleading conduct and obstruction of justice within the meaning of 18 USC 1512. Defendants used electronic and mail communications in furtherance of defendants' scheme of fraud, in violation of 18 USC 1341, 1343 and 1512. This fraud was also accomplished by defendants deliberately ignoring communications from objective doctors, trained in orthopedic medicine and other specialities, indicating plaintiffs did have work-related disabilities. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

C. Plaintiffs' damages were proximately caused by defendants' scheme of fraudulently and dishonestly denying workers compensation benefits. Mail and electronic communications were used by defendants in furtherance of the scheme. Some of these communications contained fraudulent representations to plaintiffs, but others did not. Defendants' use of mail and electronic communications in furtherance of their scheme of fraud violated 18 USC 1341 and 1343, regardless of whether those communications contained fraudulent misrepresentations relied upon by plaintiffs.

D. Some of the acts of mail and wire fraud consisted of communications between defendants, or between defendants and the IME "cut off" doctors whose reports defendants relied upon in terminating or denying plaintiffs' benefits, which plaintiffs do not have. In these communications, defendants discussed means of cutting off plaintiffs' benefits or forcing them to take settlements at less than true value, even though defendants possessed medical reports from treating doctors and doctors chosen by defendants stating plaintiffs did have work-related disabilities. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

7. At all times and in all actions plead in this complaint, Crawford & Company was acting as agent for, or in concert with, Cassens Transport.

RICO COMPLAINT OF WILLIAM FANALY AGAINST DEFENDANTS

8. On Dec. 12, 2001, William Fanaly injured his right foot during the course and scope of employment with Cassens, while he was to his Cassens carhauling truck. He missed work and sustained medical bills and wage loss due to this injury. On Dec. 14, 2001, plaintiff reported the injury to defendants, and requested workers compensation benefits. Plaintiff reported that he was coming out of the motel where he had parked the Cassens truck and stayed overnight (he was on an interstate trip with the company truck, driving from Detroit, MI, to Fenton, MO). He reported that he was walking to the truck to get into

it to drive it to Cassen's terminal when he missed a step and fell, injuring his foot. Crawford's claim adjuster, Tina Litwiller, denied the claim, stating to plaintiff on the telephone in an interstate conversation from St. Louis, MO, to Detroit, MI, that because the injury happened at a motel, it did not happen on the job.

9. On Dec. 19, 2001, Tina Litwiller, a claim adjuster for Crawford & Company in St. Louis, MO, sent to plaintiff in Westland MI, via the US mail, a Notice of Dispute concerning the injury of Dec. 12, 2001, which stated that workers compensation benefits were denied because "injury not work related." This statement and the earlier telephone statement were fraudulent communications in violation of 18 USC sections 1341 and 1343 because the corporate defendants knew that an injury which happens to an employee while he is leaving his motel during the course and scope of employment is an injury which is compensable under the Act.

10. On Feb. 17, 2002, plaintiff dislocated his left shoulder while loading his Cassens car-hauling truck, and he missed work and sustained medical bills and wage loss due to this injury. Plaintiff filed a claim for benefits under the Michigan Workers Disability Compensation Act, MCL 481.101 et seq.

11. Defendants sent plaintiff for examinations to Dr. Saul Margules. Defendants sent plaintiff for examinations to Dr. Saul Margules. Defendants have a long-standing business relationship with

Dr. Margules. For many years, defendants have sent dozens of Cassens workers to him for opinions on whether the workers had job-related disabilities. Dr. Margules is board certified only in family medicine. He works in Macomb County, MI.

12. Defendants expressly or implied communicated to Dr. Margules that it wanted him to write reports stating plaintiff was not disabled due to work-related injuries, regardless of the true circumstances. Defendants' actions violated 18 USC §1341, 1343, and 1512. These communications were by mail and wire and are not in the possession of plaintiff but are in the possession of defendants. This allegation is based in part on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

13. In February or March, 2002, Margules opined to defendants that plaintiff had no job-related disability relating to his shoulder.

14. On Feb. 21, 2002, Tina Litwiller, a claim adjuster for Crawford & Company in St. Louis, MO, sent to plaintiff in Westland MI, via the US mail, a Notice of Dispute concerning the shoulder injury of 2/17/02, which stated that workers compensation benefits were denied because "condition is chronic – per Dr. Marglious [sic]."

15. This fraudulent statement via the mail violated 18 USC section 1341.

16. Defendants' statements were fraudulent because the chronicity of a condition is not a legal basis for denial of benefits, and because defendants had proof that plaintiff injured his shoulder during the course and scope of employment. Also, the corporate defendants knew or should have known Dr. Margules' opinion was an unreliable basis for denial of benefits, because Dr. Margules was not an expert in orthopedic conditions, because Dr. Margules was biased due to the amount of money defendants paid him over the years to examine Cassens workers and to testify against them in workers compensation cases, and because plaintiff's treating surgeons opined, based on what they saw in exams and during surgery, that plaintiff's pathology was work-related.

16A If, in fact, Margules opined to the other defendants that plaintiff had no job-related disability. Margules' actions violated 18 USC §1512. This communication was by mail and wire and are not in the possession of plaintiff but are in the possession of defendants. This allegation is based in part on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

17. Plaintiff relied on the fraudulent communications to the extent he suffered the financial loss of having to pay attorney fees, medical care and medical mileage. Defendants' fraud directly caused injury to plaintiff because it deprived him of workers compensation benefits and because it caused him the expense

of paying attorney fees, medical care and mileage to and from medical care.

18. At all times and in all actions plead in this complaint, Crawford & Company was acting as agent for, or in concert with, Cassens Transport. Decisions regarding paying claims or terminating payment were made jointly by defendants, or were made by Crawford after consulting with Cassens, or were ratified by Cassens after being made by Liberty. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

19. This cause of action arises under 18 USC 1961, 1962, 1964 and 1965. The allegations made herein are based on the facts alleged herein, on information and belief, and are likely to have evidentiary support after a reasonable opportunity for further investigation and discovery. With regard to allegations concerning the enterprise, pattern of conduct, predicate acts and other offenses, William Fanaly incorporates herein the pleadings of the other plaintiffs, and relies also on statements made and actions taken by defendants with regard to the claims of James Lambrich, Mark West, David Slayton and other Cassens employees.

20. Cassen's and Crawford's workers compensation officials formed an "enterprise" within the meaning of the RICO Act, which engaged in a pattern of racketeering aimed at fraudulently denying workers

compensation benefits to the plaintiffs in this suit, and to other employees of Cassens. Alternatively, the enterprise consisted of defendant's workers compensation officials plus Dr. Margules. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

21. Defendants used the Postal Service and the wires for interstate communications in effectuation of their scheme, demonstrating and involving a threat of continuing racketeering activity against employees of UPS who are entitled to Michigan workers compensation benefits..

WHEREFORE William Fanaly demands judgment against defendants for damages measured by the amount of benefits improperly withheld from him, plus interest as provided by law, all tripled in accordance with RICO, together with attorney fees and costs as provided by law.

RICO COMPLAINT OF CHARLES THOMAS AGAINST CRAWFORD & COMPANY AND CASSENS TRANSPORT

22. Plaintiff Charles Thomas was working within the course and scope of his employment with Cassens Transport on April 16, 2001, when he pulled on a tie-down bar and tore the rotator cuff in his right shoulder. He made a workers compensation claim with Crawford & Company and Cassens (the corporate defendants). On or about Jan. 10, 2002, he gave

to Bill Molter, a terminal manger for Cassens, a claim form which contained in "Section 2 – Attending Physician's Statement" information that the rotator cuff tear arose out of plaintiff's employment, and that the injury occurred when "he attempted to pull a metal bar from above his head to waist level. It did not pull down easily and he had abrupt pain in his right shoulder." This Attending Physicians Statement was signed on Dec. 13, 2001, by Dr. Bailey of Meadville, PA.

23. Despite having possession of this Attending Physician's Statement, Tina Litwiller of Crawford and Company, in St. Louis, MO, mailed via the US Postal Service, on or about 1/21/02, a Notice of Dispute to plaintiff denying workers compensation benefits and stating "no medical establishing causation."

24. Litwiller's statement was fraudulent and in violation of 18 USC §1341 because she possessed a medical statement establishing causation. Defendants also committed mail fraud in that their pleadings in the workers compensation case fraudulently denied that plaintiff suffered a work-related injury when they had knowledge that plaintiff had suffered a work-related injury.

25. Defendants' fraud directly caused injury to plaintiff because it deprived him of workers compensation benefits and because it caused him the expense of paying attorney fees, medical care and mileage to and from medical care. Plaintiff relied on

the communication to the extent he suffered the financial loss of having to pay attorney fees, medical care and medical mileage.

26. At all times and in all actions plead in this complaint, Crawford & Co was acting as agent for, or in concert with, Cassens Transport. Decisions regarding paying claims or terminating payment were made jointly by Cassens and Crawford, or were made by Crawford after consulting with Cassens, or were ratified by Cassens after being made by Crawford. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

27. This cause of action arises under 18 USC 1961, 1962, 1964 and 1965. The allegations made herein are based on the facts alleged herein, on information and belief, and are likely to have evidentiary support after a reasonable opportunity for further investigation and discovery. With regard to allegations concerning the enterprise, pattern of conduct, predicate acts and other offenses, Charles Thomas incorporates herein the pleadings of the other plaintiffs, and relies also on statements made and actions taken by defendants with regard to the claims of James Lambrich, Mark West, David Slayton and other Cassens employees.

28. The corporate defendants' workers compensation officials formed an "enterprise" within the meaning of the RICO Act, which engaged in a pattern

of racketeering aimed at fraudulently denying workers compensation benefits to the UPS employees in this suit, fraudulently terminating those benefits, and extorting plaintiff to settle his workers compensation claim.

29. Defendants used the Postal Service and the wires for interstate communications in effectuation of their scheme, demonstrating and involving a threat of continuing racketeering activity against employees of UPS who are entitled to Michigan workers compensation benefits..

WHEREFORE Charles Thomas demands judgment against Crawford & Company and Cassens Transport for damages measured by the amount of benefits improperly withheld from him, plus interest as provided by law, all tripled in accordance with RICO, together with attorney fees and costs as provided by law.

RICO COMPLAINT OF PAUL BROWN AGAINST DEFENDANTS

30 On April 12, 2000, Paul Brown injured his left knee when he twisted his left leg climbing down off Cassen's car hauler, in the course and scope of employment. The injury to the knee was aggravated by work done through May 3, 2000. On Feb. 15, 2002, plaintiff injured his shoulders pulling on a tie-down bar with great force, and later that day he injured his right knee. He continued working until March 4,

2002, and continued work aggravated those conditions.

31 Plaintiff filed a claim for benefits under the Michigan Workers Disability Compensation Act, MCL 481.101 et seq.

32. Defendants sent plaintiff for examinations to Dr. Saul Margules. Defendants have a longstanding business relationship with Dr. Margules. For many years, defendants have sent dozens of Cassens workers to him for opinions on whether the workers had job-related disabilities. Dr. Margules is board certified only in family medicine. He works in Macomb County, MI. Defendants expressly or implied communicated to Dr. Margules that it wanted him to write reports stating plaintiff was not disabled due to work-related injuries, regardless of the true circumstances. Defendants' actions violated 18 USC §1341, 1343, and 1512. These communications were by mail and wire and are not in the possession of plaintiff but are in the possession of defendants. This allegation is based in part on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

33. Plaintiff's treating orthopedic surgeons, Drs. Mark Pinto and Billy Joe Page, both board-certified in orthopedic surgery, operated on plaintiff's knees and shoulders. They wrote reports and gave depositions, based on their clinical exams and observations during surgery, stating that plaintiff had job-related disabilities due to pathology in his knees and

shoulders. These reports and depositions were received by defendants, and provided a sufficient basis for payment of plaintiff's workers compensation claim.

34. Margules opined to the other defendants that plaintiff had no job-related disability. This communications was by mail and wire and are not in the possession of plaintiff but are in the possession of defendants. This allegation is based in part on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

34A. Margules opined to the other defendants that plaintiff had no job-related disability. Margules' actions violated 18 USC §1512. This communication was by mail and wire and are not in the possession of plaintiff but are in the possession of defendants. This allegation is based in part on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

35. On March 19, 2002, Tina Litwiller, a claim adjuster for Crawford & Company in St. Louis, MO, sent to Paul Brown in Pinckney MI, via the US mail, a Notice of Dispute (a form provided by the Michigan Department of Labor, Bureau of Workers Disability Compensation). The Notice of Dispute stated that workers compensation benefits were denied because "medical condition not work related." This fraudulent statement via the mail violated 18 USC section 1341.

36. Ms. Litwiller relied on the opinion of Dr. Margules to deny benefits. Cassens joined in her decision or ratified it.

37. The statement "medical condition not work related" was fraudulent. Defendants knew or should have known this statement was false, or Crawford & Company and Cassens knew or should have known that Dr. Margules' opinion was an unreliable basis for denial of benefits, because Dr. Margules was not an expert in orthopedic conditions, because Dr. Margules was biased due to the amount of money defendants paid him over the years to examine Cassens workers and to testify against them in workers compensation cases, and because plaintiff's treating surgeons had opined, based on what they saw in exams and during surgery, that plaintiff's pathology was work-related.

38. Defendants' fraud directly caused injury to plaintiff because it deprived him of workers compensation benefits and because it caused him the expense of paying attorney fees, medical care and mileage to and from medical care. Paul Brown relied on defendants' fraudulent statement and suffered the expense of having to pay attorney fees, medical bills and medical mileage, as well as loss of workers compensation wage loss benefits.

39. After defendants denied plaintiff's workers compensation claim, the case proceeded to a hearing. The only medical evidence submitted by defendant was the deposition of Dr. Margules. On March 20, 2003, the magistrate awarded benefits to plaintiff.

The order awarding benefits was mailed to all parties by the Michigan Bureau of Workers Disability Compensation/Board of Magistrates. Defendants appealed the decision to the Michigan Workers Compensation Appellate Commission (WCAC) and began paying 70% weekly benefits, which they were obligated to pay during appeal under the Act..

40. After March 20, 2003, Paul Brown and his health care providers submitted medical bills which arose during appeal and which were related to the conditions for which benefits were awarded. Under MCL 418.862(2), defendants were obligated during appeal to pay these bills.

41. Tina Litwiller, told Janice Manning, on Nov. 5, 2003, Jodie Heselschwerdt on October 13, 2003, and Leatha LaForge on or about Nov. 1, 2003, via interstate telephone communications between St. Louis, MO, and Pinckney or Chelsea, MI, that she did not have to pay any medical bills during appeal. Manning, LaForge and Heselschwerdt are billing clerks for doctors, hospitals or pharmacies who provided medical care to plaintiff during appeal. Also, Litwiller told plaintiff in an interstate phone conversation between St. Louis, MO, and Pinckneya [sic], MI, in April 2003, that she did not have to pay medical bills arising during appeal. Litwiller's statements were false and fraudulent because defendants knew they were obligated by law to pay medical bills arising during appeal.

41A. During the corporate defendants' appeal to the WCAC of plaintiff's award of benefits, plaintiff filed a motion to dismiss defendants' appeal on the ground that defendants failed to pay medical bills arising during appeal. Defendants opposed the motion, submitting various documents to the WCAC. On March 29, 2004, defendants submitted to plaintiff's counsel in Southfield, MI, and to the WCAC in Lansing, MI, via wire (facsimile) and the US mail, an affidavit of Kathy Connor, who identified herself as an adjuster at Crawford & Company in Missouri. Her affidavit stated inter alia, "We had been under the misimpression that only the 70% weekly benefits need be paid during the appeal in Michigan, but that misinterpretation has been corrected and all the past due medical expenses are now paid." On April 7, 2004, defendants submitted to plaintiff's counsel in Southfield, MI, and to the WCAC in Lansing, MI, via wire (facsimile) and the US mail, an affidavit of Tina Litwiller, who identified herself as an adjuster at Crawford & Company in Missouri. Her affidavit stated inter alia, "I had been under the misimpression that only the 70% weekly benefits need be paid during the appeal in Michigan, but that misinterpretation has been corrected and all the past due medical expenses are now paid." These statements were fraudulent because defendants and the affiants knew they were obligated by Michigan's worker's disability compensation act (the Act) to pay medical bills arising during appeal. These fraudulent statement via the mail and or wire violated 18 USC section 1341 and 1343.

42. Plaintiff relied on the fraudulent communications to the extent he suffered the financial loss of having to pay attorney fees, medical bills and medical mileage. Defendants' fraud directly caused injury to plaintiff because it deprived him of workers compensation benefits and because it caused him the expense of paying attorney fees, medical bills and mileage to and from medical care.

43. At all times and in all actions plead in this complaint, Crawford & Company was acting as agent for, or in concert with, Cassens Transport. Decisions regarding paying claims or terminating payment were made jointly by defendants, or were made by Crawford after consulting with Cassens, or were ratified by Cassens after being made by Crawford. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

44. This cause of action arises under 18 USC 1961, 1962, 1964 and 1965. The allegations made herein are based on the facts alleged herein, on information and belief, and are likely to have evidentiary support after a reasonable opportunity for further investigation and discovery. With regard to allegations concerning the enterprise, pattern of conduct, predicate acts and other offenses, Paul Brown incorporates herein the pleadings of the other plaintiffs, and relies also on statements made and actions taken by defendants with regard to the claims

of James Lambrich, Mark West, David Slayton and other Cassens employees.

45. Defendants' workers compensation officials formed an "enterprise" within the meaning of the RICO Act, which engaged in a pattern of racketeering aimed at fraudulently denying workers compensation benefits to the plaintiffs in this suit, and to other employees of Cassens. Alternatively, the enterprise consisted of defendant's workers compensation officials plus Dr. Margules. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

46. Defendants used the Postal Service and the wires for interstate communications in effectuation of their scheme, demonstrating and involving a threat of continuing racketeering activity against employees of UPS who are entitled to Michigan workers compensation benefits..

WHEREFORE Paul Brown demands judgment against defendants for damages measured by the amount of benefits improperly withheld from him, plus interest as provided by law, all tripled in accordance with RICO, together with attorney fees and costs as provided by law.

RICO COMPLAINT OF GARY RIGGS AGAINST CASSENS TRANSPORT AND CRAWFORD & COMPANY

47. Gary Riggs worked for Cassens as a car hauler. In 2001, he was diagnosed as having a benign tumor. As a result of symptoms caused by the tumor, Dr. Martin Kornblum gave him a prescription for a handicap parking sticker. Plaintiff had surgery for the tumor in 2001 and returned to work without restriction in 2001 or 2002. On Feb., 23, 2003, long after plaintiff returned to work, he slipped and fell within the course and scope of employment for Cassens. Another injury occurred at work on April 8, 2003. As a result of these two injuries, plaintiff Gary Riggs has been unable to work. In July, 2003, his workers compensation attorney, John Charters, sent to Cassens and Crawford medical records concerning the tumor problem, including information concerning the prescription for a handicap sticker, which preceded the fall at work. Plaintiff was entitled to benefits under the Michigan Workers Disability Compensation Act, Cassens and Crawford began voluntarily paying workers compensation benefits.

48. On February 18, 2004, Tina Litwiller, claim adjuster for Crawford in St. Louis, MO, mailed via the US mail to plaintiff, in Marlette, MI, a Notice of Dispute, informing plaintiff that his workers compensation benefits were terminated.. This notice contained the statement, "waiting on handicap information, physician medical report in regards to disability." This statement was fraudulent, because

Cassens and Crawford had been given by John Charters, in 2003, the information and reports. These fraudulent statement via the mail and or wire violated 18 USC section 1341 and 1343.

49. In March and April, 2004, Richard Lovernick, attorney for Cassens and Crawford, told John Charters that his clients had no legitimate basis to terminate plaintiff's benefits.

50. Plaintiff relied on the fraudulent communication to the extent he suffered the financial loss of having to pay attorney fees, medical bills and medical mileage. Defendants' fraud directly caused injury to plaintiff because it deprived him of workers compensation benefits and because it caused him the expense of paying attorney fees, medical bills and mileage to and from medical care.

51. At all times and in all actions plead in this complaint, Crawford & Company was acting as agent for, or in concert with, Cassens Transport. Decisions regarding paying claims or terminating payment were made jointly by defendants, or were made by Crawford after consulting with Cassens, or were ratified by Cassens after being made by Crawford. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

52. This cause of action arises under 18 USC 1961, 1962, 1964 and 1965. The allegations made herein are based on the facts alleged herein, on

information and belief, and are likely to have evidentiary support after a reasonable opportunity for further investigation and discovery. With regard to allegations concerning the enterprise, pattern of conduct, predicate acts and other offenses, Paul Brown incorporates herein the pleadings of the other plaintiffs, and relies also on statements made and actions taken by defendants with regard to the claims of James Lambrich, Mark West, David Slayton and other Cassens employees.

53. Defendants' workers compensation officials formed an "enterprise" within the meaning of the RICO Act, which engaged in a pattern of racketeering aimed at fraudulently denying workers compensation benefits to the plaintiffs in this suit, and to other employees of Cassens. Alternatively, the enterprise consisted of defendant's workers compensation officials plus Dr. Margules. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

54. Defendants used the Postal Service and the wires for interstate communications in effectuation of their scheme, demonstrating and involving a threat of continuing racketeering activity against employees of UPS who are entitled to Michigan workers compensation benefits..

WHEREFORE Gary Riggs demands judgment against defendants Cassens Transport and Crawford & Company for damages measured by the amount of benefits improperly withheld from him, plus interest as provided by law, all tripled in accordance with RICO, together with attorney fees and costs as provided by law.

RICO COMPLAINT OF ROBERT ORLIKOWSKI AGAINST DEFENDANTS

55. On or about November 6, 2000, Robert Orlikowski injured his left knee while employed as a car hauler by Cassens. The injury was caused by trauma suffered that day and or by aggravation, caused by years of car-hauling work for Cassens, of degenerative arthritis arising from a 1980 injury to the left knee which did not occur while working for Cassens. Plaintiff was disabled by the injury and required surgery. Under the Michigan Workers Disability Compensation Act, plaintiff was entitled to medical care and wage loss benefits injury caused by trauma at work and or by aggravation, caused by years of car-hauling work for Cassens, of degenerative arthritis arising from a 1980 injury to the left knee which did not occur while working for Cassens.

56. Plaintiff reported the injury and was sent for examination to Dr. Saul Margules. Dr. Margules examined plaintiff and immediately called Tina Litwiller; plaintiff overheard Dr. Margules talking on the phone to Litwiller. After ending his conversation with Litwiller, Dr. Margules told plaintiff he could return to work without restriction., although plaintiff's knee was in pain and was swollen, and

Dr. Margules knew plaintiff's job as a car hauler required repetitive climbing of ramps and ladders, repetitive squatting and kneeling, strenuous lifting, pushing and pulling, and walking on narrow ramps nine feet above ground. Dr. Margules did not order an MRI. His initial diagnosis was "acute knee strain," a diagnosis of injury which would entitle plaintiff to benefits under the Act. Two days later, on November 8, 2000, Dr. Margules made the diagnosis, "Severe abnormality of L. knee, not particularly work related.," and again released plaintiff for work without restriction.

57. On or later than November 8, 2000, Dr. Margules reported to Cassens and Crawford:

> In Conclusion:
>
> On the basis of Mr. Orlikowski's prior surgery and degenerative changes noted in the knee, I can only conclude that he has severe arthritis with degenerative changes that are many years old. He sustained trauma to the left knee and required surgery several years ago. His present injury that of twisting his knee could not have caused the changes that are shown on the MRI. All other findings are of many years longstanding.
>
> Twisting the knee would give pain in a severely arthritic knee, but not the rest of the findiings [sic].

This statement was fraudulent in that it did not mention the acute strain to the knee and did not mention the possibility that the damage to the knee may be partly work related. It was further fraudulent in stating "his present injury that of twisting his knee could not have caused the changes that are shown on the MRI," when one or more of the meniscal tears shown on the MRI could have been caused by a twisting of the knee, according to objective and unbiased orthopedic expert opinion. These fraudulent statements via the mail and or wire violated 18 USC section 1341 and 1343.

58. On November 21, 2000, Tina Litwiller, claim adjuster for Crawford in St. Louis, MO, mailed via the US mail to plaintiff, in Marlette, MI, a Notice of Dispute, informing plaintiff that his workers compensation benefits were denied on the grounds "injury not work related" "based on opinion of authorized physician." This statement was fraudulent for reasons stated in paragraph 6, and because Litwiller, Cassens and Crawford knew plaintiff would be entitled to benefits if he had suffered an "acute knee strain" at work, or if plaintiff had a "severe abnormality" which was to some degree work related even if "not particularly work related," or if plaintiff's years of work for Cassens had contributed to arthritis arising from the 1980 non-work-related injury (a possibility not discussed in Dr. Margules' written report). Litwiller could have denied benefits on the ground "further investigation required," but instead made the affirmative statement "injury not work related." These fraudulent statements via the mail and or wire violated 18 USC section 1341 and 1343.

59. On or about November 20, 2000, plaintiff began treating with a board-certified orthopedic surgeon, Dr. Lawrence Ulrey who found plaintiff had a large amount of fluid in the left knee and very limited movement of the joint. He diagnosed knee pain exacerbated by recent injury and osteoarthritis. He opined that when plaintiff twisted his knee, "either he exacerbated his pre-existing osteoarthriic [sic] condition or possibly had torn a cartilage or done something in the joint to stimulate all this fluid." Dr. Ulrey did arthroscopic surgery and found a medial meniscal tear and severe arthritis. He opined that the medical meniscal tear was "probably a new injury" and again opined that the arthritis had been aggravated or exacerbated by the incident at work. He also stated heavy manual labor of the type plaintiff did would cause arthritis to progress at a more rapid rate. This testimony clearly

60. Dr. Ulrey gave a deposition on June 20, 2002, in which he gave the opinions noted above. Despite having this information, Crawford and Cassens continued in their scheme to deny benefits.

61. Plaintiff relied on defendant's fraudulent communication to the extent he suffered the financial loss of having to pay attorney fees, medical bills and medical mileage. Defendants' fraud directly caused injury to plaintiff because it deprived him of workers compensation benefits and because it caused him the expense of paying attorney fees, medical bills and mileage to and from medical care.

62. At all times and in all actions plead in this complaint, Crawford & Company was acting as agent for, or in concert with, Cassens Transport. Decisions regarding paying claims or terminating payment were made jointly by defendants, or were made by Crawford after consulting with Cassens, or were ratified by Cassens after being made by Crawford. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

63. This cause of action arises under 18 USC 1961, 1962, 1964 and 1965. The allegations made herein are based on the facts alleged herein, on information and belief, and are likely to have evidentiary support after a reasonable opportunity for further investigation and discovery. With regard to allegations concerning the enterprise, pattern of conduct, predicate acts and other offenses, Paul Brown incorporates herein the pleadings of the other plaintiffs, and relies also on statements made and actions taken by defendants with regard to the claims of James Lambrich, Mark West, David Slayton and other Cassens employees.

64. Defendants' workers compensation officials formed an "enterprise" within the meaning of the RICO Act, which engaged in a pattern of racketeering aimed at fraudulently denying workers compensation benefits to the plaintiffs in this suit, and to other employees of Cassens. Alternatively, the enterprise consisted of defendant's workers compensation

officials plus Dr. Margules. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

65. Defendants used the Postal Service and the wires for interstate communications in effectuation of their scheme, demonstrating and involving a threat of continuing racketeering activity against employees of UPS who are entitled to Michigan workers compensation benefits..

WHEREFORE plaintiff demands judgment against defendants for damages measured by the amount of benefits improperly withheld from him, plus interest as provided by law, all tripled in accordance with RICO, together with attorney fees and costs as provided by law.

RICO COMPLAINT OF SCOTT WAY AGAINST DEFENDANTS

66. On or about March 12, 2002, Scott Way hurt his low back at work when he fell off a truck and thereafter had stiffness in his low back and worked slower than usual because of this stiffness. Plaintiff received no treatment for this injury. On June 10, 2002, he was working slower than usual because of stiffness in the low back.

67. On June 10, 2002, plaintiff was standing on the ground, leaning his left hand on the hood of a car which was on the car hauler, standing on tip toes to

reach a ratchet over his head with his right arm fully outstretched while twisting and bending at the waist, when he had a sudden sharp pain in his low back. His low back stiffness increased substantially between that event and the next morning. Plaintiff was able to complete his work that day and the next day, with assistance from fellow workers. Low back pain increased the next day, as a result of which he stopped working on June 11, 2002, and reported the injury to Cassens.

68. On June 12, 2002, plaintiff was sent by Cassens to Dr. Margules. Plaintiff did not complain of any radiating pain or other problems in the left leg, only of low back pain and stiffness. Dr. Margules, at 31200 Dequindre, Warren MI, examined plaintiff and mailed a report to Tina Litwiller, Crawford Insurance, po box 411280, St. Louis MO 63141, on June 19, 2002. The report's Comment and Conclusion sections concentrated only on MRI findings and concluded plaintiff's L4-5 disc herniation was not related to the incident of June 10, 2002. This report was fraudulent insofar as it was intended to serve as a basis for denial of plaintiff's workers compensation claim because (a) Dr. Margules knew plaintiffs low back pain may have been caused by a work-related injury other than an L4-5 disc herniation, and this injury would qualify plaintiff for workesr [sic] compensation, and (b) Dr. Margules knew the L4-5 herniation may have been aggravated by the workp incident even if not caused by that incident, and if it was aggravated, then plaintiff could qualify for workers compensation.

The report was also fraudulent because Dr. Margules did not intend to examine plaintiff objectively but was biased and favored Cassens and Crawford because of the amount of money defendants paid him.

69. Tina Litwiller, in St. Louis, MO, mailed to plaintiff in Three Rivers, MI, a Notice of Dispute on or about July 29, 2002, stating, "Based on Dr. Margules' 6/19/02 report and opinion, compensation is not being paid." This Notice of Dispute was fraudulent because (a) Litwiller knew plaintiff's low back pain may have been caused by a work-related injury other than an L4-5 disc herniation, and this injury would qualify plaintiff for workesr [sic] compensation, and (b) she knew the L4-5 herniation may have been aggravated by the work incident even if not caused by that incident, and if it was aggravated, then plaintiff could qualify for workers compensation. The report was also fraudulent because she knew Dr. Margules did not intend to examine plaintiff objectively but was biased and favored Cassens and Crawford because of the amount of money defendants paid him.

70. Plaintiff relied on defendant's fraudulent communication to the extent he suffered the financial loss of having to pay attorney fees, medical bills and medical mileage. Defendants' fraud directly caused injury to plaintiff because it deprived him of workers compensation benefits and because it caused him the expense of paying attorney fees, medical bills and mileage to and from medical care.

71. At all times and in all actions plead in this complaint, Crawford & Company was acting as agent for, or in concert with, Cassens Transport. Decisions regarding paying claims or terminating payment were made jointly by defendants, or were made by Crawford after consulting with Cassens, or were ratified by Cassens after being made by Crawford. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

72. This cause of action arises under 18 USC 1961, 1962, 1964 and 1965. The allegations made herein are based on the facts alleged herein, on information and belief, and are likely to have evidentiary support after a reasonable opportunity for further investigation and discovery. With regard to allegations concerning the enterprise, pattern of conduct, predicate acts and other offenses, Paul Brown incorporates herein the pleadings of the other plaintiffs, and relies also on statements made and actions taken by defendants with regard to the claims of James Lambrich, Mark West, David Slayton and other Cassens employees.

73. Defendants' workers compensation officials formed an "enterprise" within the meaning of the RICO Act, which engaged in a pattern of racketeering aimed at fraudulently denying workers compensation benefits to the plaintiffs in this suit, and to other employees of Cassens. Alternatively, the enterprise consisted of defendant's workers compensation

officials plus Dr. Margules. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

74. Defendants used the Postal Service and the wires for interstate communications in effectuation of their scheme, demonstrating and involving a threat of continuing racketeering activity against employees of UPS who are entitled to Michigan workers compensation benefits..

WHEREFORE plaintiff demands judgment against defendants for damages measured by the amount of benefits improperly withheld from him, plus interest as provided by law, all tripled in accordance with RICO, together with attorney fees and costs as provided by law.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIMS OF ALL PLAINTIFFS AGAINST CASSENS TRANSPORT AND CRAWFORD & COMPANY

75. Cassens Transport and Crawford & Company engaged in a "continuous pattern of harassment, abuse and unethical conduct," as that phrase was used in *Hailes v Liberty Mutual Ins Co,* no 215509, 1999 WL 33326762 (Mich App Dec. 28, 1999), and also fraudulent conduct, intentionally inflicting emotional distress on plaintiffs and on other Cassens employees (eg, Mark West, David Slayton, James

Lambrich). This conduct includes the acts alleged by each plaintiff in their complaints, above.

76. Plaintiffs incorporate all prior paragraphs of this complaint.

77. Defendants' conduct proximately caused injury to plaintiffs, causing them emotional distress, for which each plaintiff is entitled to damages exceeding $100,000.

WHEREFORE plaintiffs each demand damages from defendants in an amount exceeding $100,000.

JURY DEMAND

Plaintiffs demand a jury trial.

/s/ M. Lasser
Marshall Lasser PC, by
Marshall Lasser P25573
po box 2579, Southfield MI 48307 (248) 647 7722
Date: June 21, 2004
F:\wp51\DOCS\cassens\Complaint

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN

PAUL BROWN, WILLIAM
FANALY, CHARLES THOMAS
GARY RIGGS, ROBERT
ORLIKOWSKI, SCOTT WAY,

Plaintiffs,

v

CASSENS TRANSPORT COMPANY and CRAWFORD &
COMPANY, foreign corporations,
and DR. SAUL MARGULES,

Defendants.

Case No.: 04-CV 72316
Hon. Paul D. Borman

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NOTICE OF APPEAL

Notice is hereby given that PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI and SCOTT WAY, hereby appeal to the United States Court of Appeals for the Sixth Circuit from The Opinion and Order Granting Defendant's Motion to Dismiss Plaintiff's Complaint Under Rule 12(b)(6) entered on July 15, 2005.

/s/ Marshall Lasser
Marshall Lasser P25573
MARSHALL LASSER PC
Attorney for plaintiffs
P.O. Box 2579
Southfield MI 48037
248-647-7722

Dated: July 28, 2005

MCL 418.801. Payment of compensation, recipient, time, records, reports; penalty payment

Sec. 801. (1) Compensation shall be paid promptly and directly to the person entitled thereto and shall become due and payable on the fourteenth day after the employer has notice or knowledge of the disability or death, on which date all compensation then accrued shall be paid. Thereafter compensation shall be paid in weekly installments. Every carrier shall keep a record of all payments made under this act and of the time and manner of making the payments and shall furnish reports, based upon these records, to the bureau as the director may reasonably require.

(2) If weekly compensation benefits or accrued weekly benefits are not paid within 30 days after becoming due and payable, in cases where there is not an ongoing dispute, $50.00 per day shall be added and paid to the worker for each day over 30 days in which the benefits are not paid. Not more than $1,500.00 in total may be added pursuant to this subsection.

(3) If medical bills or travel allowance are not paid within 30 days after the carrier has received notice of nonpayment by certified mail, in cases where there is no ongoing dispute, $50.00 or the amount of the bill due, whichever is less, shall be added and paid to the worker for each day over 30 days in which the medical bills or travel allowance are not paid. Not more than $1,500.00 in total may be added pursuant to this subsection.

(4) For purposes of rate-making, daily charges paid under subsection (2) shall not constitute elements of loss.

(5) An employer who has notice or knowledge of the disability or death and fails to give notice to the carrier shall pay the penalty provided for in subsection (2) for the period during which the employer failed to notify the carrier.

(6) When weekly compensation is paid pursuant to an award of a worker's compensation magistrate, an arbitrator, the board, the appellate commission, or a court, interest on the compensation shall be paid at the rate of 10% per annum from the date each payment was due, until paid.

MCL 418.861b. Vexatious claims

Sec. 861b. The commission, upon its own motion, or the motion of any party, may dismiss a claim for review, assess costs, or take other disciplinary action when it has been determined that the claim or any of the proceedings with regard to the claim was vexatious by reason of either of the following:

(a) That the claim was taken for purposes of hindrance or delay or without any reasonable basis for belief that there was meritorious issue to be determined on appeal.

(b) That any pleading, motion, argument, petition, brief, document, or appendix filed in the cause or any testimony presented in the cause was grossly lacking in the requirements of propriety or grossly disregarded the requirements of a fair presentation of the issues.

MCL 418.862. Payment of weekly or medical benefits during pendency of appeal; payment or reimbursement upon final determination; interest; attorneys' fees

Sec. 862. (1) A claim for review filed pursuant to section 859, 859a, 860, 861, or 864(11) shall not operate as a stay of payment to the claimant of 70% of the weekly benefit required by the terms of the award of the worker's compensation magistrate or arbitrator . Payment shall commence as of the date of the worker's compensation magistrate's or arbitrator's award, and shall continue until final determination of the appeal or for a shorter period if specified in the award. Benefits accruing prior to the award shall be withheld until final determination of the appeal. If the weekly benefit is reduced or rescinded by a final determination, the carrier shall be entitled to reimbursement in a sum equal to the compensation paid pending the appeal in excess of the amount finally determined. Reimbursement shall be paid upon audit and proper voucher from the second injury fund established in chapter 5. If the award is affirmed by a final determination, the carrier shall pay all compensation which has become due under the provisions of the award, less any compensation already paid.

Interest shall not be paid on amounts paid pending final determination. Payments made to the claimant during the appeal period shall be considered as accrued compensation for purposes of determining attorneys' fees under the rules of the bureau.

(2) A claim for review filed pursuant to section 859a or 864(11) of a case for which an application under section 847 is filed after March 31, 1986 shall not operate as a stay of providing medical benefits required by the terms of the award. Medical benefits shall be provided as of the date of the award and shall continue until final determination of the appeal or for a shorter period if specified in the award. Benefits accruing prior to the award shall be withheld until final determination of the appeal. If the benefit amount is reduced or rescinded by a final determination, the carrier shall be reimbursed for the amount of the expenses incurred in providing the medical benefits pending the appeal in excess of the amount finally determined. Reimbursement shall be paid upon audit and proper voucher from the general fund of the state. If the award is affirmed by a final determination, the carrier shall provide all medical benefits which have become due under the provisions of the award, less any benefits already provided for. Interest shall not be paid on amounts paid pending final determination.